SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

JOHN DAVID ROGERS,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Federal Employers' Liability Act ("FELA"), a railroad's non-delegable duty to provide a safe workplace requires the railroad to inspect third-party premises on which the railroad's workers are required to perform their duties.

2. Whether a jury's finding in an FELA suit that "fault of the employer played any part in the employee's injury," *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957), may be overturned by a state supreme court that does not address the evidence adduced at trial.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

John David Rogers was the plaintiff below, the appellee in the court of appeals, and the petitioner in the South Carolina Supreme Court.

Norfolk Southern Corporation and Norfolk Southern Railway Company were defendants below, appellants in the court of appeals, and the respondents in the South Carolina Supreme Court.

U.S. Silica Company was a defendant below. U.S. Silica filed an appeal of the trial-court verdict, but that appeal was withdrawn following settlement.

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PETITION FOR A WRIT OF CERTIORARI

John David Rogers respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

PRELIMINARY STATEMENT

The Federal Employers' Liability Act ("FELA") imposes damages liability on "[e]very common carrier by railroad" to its employees for any "injury or death" that results "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. This Court has long interpreted the FELA to impose a non-delegable duty on railroads to provide their employees with a safe place to work. *See, e.g., Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 558 (1987).

In this FELA case, petitioner John David Rogers was severely injured when he was dispatched to inspect a hole under a spur track at a plant of a third party served by respondents Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "Norfolk Southern"). The evidence at trial persuaded the jury that Norfolk Southern had failed to provide Rogers a safe place to work because, in all the time it had sent employees to that third party's premises, Norfolk Southern had never inspected the premises for a dangerous condition (an uncased pipe) that led to Rogers' injury.

The South Carolina Supreme Court, by a 3-2 vote, overrode that jury determination. The state supreme court did *not* dispute that no prior inspection for this dangerous condition had ever been done, but nevertheless found that, as a matter of law, Norfolk Southern could not have been negligent.

The South Carolina Supreme Court's judgment squarely conflicts with decisions of several federal courts of appeals, which have held that the FELA imposes a duty on railroads to inspect third-party premises on which their employees work. Had this case arisen in those courts – indeed, had this case been litigated in federal court sub-

ject to Fourth Circuit review – the jury's judgment in favor of Rogers would have been affirmed. That split of authority is particularly significant because it goes to the heart of Congress's intent to give railroads a strong incentive to provide a safe workplace. Under decisions such as the one below, railroads have little incentive to take affirmative steps to discover and remedy dangerous conditions before they cause injury.

Review is all the more warranted in this case because Congress's intent in enacting the FELA was "to secure the [plaintiff's] right to a jury determination." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957). Thus, this Court "is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination." *Id.* The Court has thus granted plenary review or summarily reversed in multiple FELA cases where a lower court has overstepped its proper function. *See* pp. 20-21, *infra*. The Court should do the same here. Notwithstanding the South Carolina Supreme Court's statement that there was not a "scintilla" of evidence supporting the jury verdict, testimony and photographs in the record proved that the hazard in question was visible and violated accepted industry standards that Norfolk Southern itself had adopted. In disregarding evidence of the railroad's failure to inspect the third party's premises, failure to inquire of possible dangerous conditions, and failure to require compliance with industry standards, the state supreme court announced an erroneous rule in conflict with numerous state and federal courts.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App., *infra*, 1a-10a) is reported at 588 S.E.2d 87. The opinion of the court of appeals (App., *infra*, 11a-22a) is reported at 538 S.E.2d 664.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on September 22, 2003. On November 6, 2003, the South Carolina Supreme Court denied a petition for rehearing. App., *infra*, 70a. On January 27, 2004, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 5, 2004. *Id.* at 71a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, are reproduced at App., *infra*, 72a-76a.

STATEMENT

This Statement is based on the facts as presented to the jury and on which the jury reasonably based its finding that Norfolk Southern was negligent.

1. Petitioner Rogers worked as an assistant track supervisor for Norfolk Southern. In June 1993, Rogers was sent by Norfolk Southern to inspect a hole under a spur track at a U.S. Silica sand plant served by Norfolk Southern. R. 793 (App., *infra*, 64a-66a). As Rogers approached the hole – as he was required to do – the ground under him caved in, causing Rogers significant back injuries for which he spent weeks in the hospital, needed two surgeries, and suffered numbness and debilitating pain for years. R. 72, 265, 683-85. Because of those injuries, Rogers was never again allowed to work for Norfolk Southern. R. 690-91.

The ground caved in because of the rupture of a plastic uncased slurry[1] pipe that ran under the track. R. 157-58. Breakage of slurry pipes is an ordinary occurrence because slurry is abrasive and, over time, erodes the plastic piping and causes it to rupture. R. 136-37, 215. Accordingly, written industry and general engineering standards

[1] Slurry is a mixture of sand and water.

– standards adopted by Norfolk Southern – required that slurry pipes that go under rail lines be cased, unless an exception is granted by the railroad. R. 323, 325, 330 (App., *infra*, 58a-61a). If those industry standards (known as the American Railway Engineering Association or "AREA" standards) had been followed and there had been a casing around the slurry pipe, the ground would not have caved in and Rogers would not have been injured. R. 131, 152-53, 341 (App., *infra*, 57a-58a, 61a-62a).

Despite the frequency with which Norfolk Southern employees were at the U.S. Silica facility, Norfolk Southern never inspected that premises (or otherwise inquired) to determine whether the slurry pipes that ran under the track were cased in the manner required by industry standards. R. 792-93, 801-02 (App., *infra*, 64a-68a). Norfolk Southern failed to take these actions even though the record, including photographic evidence, showed that the slurry pipes were visible – indeed, they ran above-ground for a full quarter of a mile after coming out of the ground on the side of the track – and even though the nature of the plant strongly indicated that slurry would need to be conveyed across the rail line. R. 89-90, 114-15, 1097-1106 (App., *infra*, 53a-56a). Moreover, a Norfolk Southern engineer testified that Norfolk Southern reviewed the plans and specifications of all sidetracks, including the one at U.S. Silica's facility, and that those plans would have shown the piping under the tracks. R. 570 (App., *infra*, 62a-64a).

2. After his injury, Rogers filed suit against Norfolk Southern and U.S. Silica in the Fairfield County Court of Common Pleas. Rogers asserted claims against Norfolk Southern under the FELA and alleged, among other things, that Norfolk Southern had failed to provide him a safe place to work. After a week-long trial, the jury returned a verdict for Rogers and assessed damages in the amount of $3,000,000. App., *infra*, 49a-52a.

The trial court subsequently denied Norfolk Southern's motion for judgment notwithstanding the verdict and de-

termined both that the jury was properly instructed and that its conclusions were supported by the evidence. *Id.* at 23a-48a. In a written order, the court specifically rejected Norfolk Southern's argument that it had no knowledge of, and no reason to know of, the fact that U.S. Silica installed slurry pipes under the tracks. The court found that Norfolk Southern could have discovered that fact if it had complied with its duty to inspect U.S. Silica's property – what the court termed Norfolk Southern's "duty of inquiring." *Id.* at 27a-28a. The court explained: "The evidence suggests that Norfolk Southern was familiar with the AREA regulations as well as its own guidelines requiring pipes running underneath tracks to be encased. Further, [Norfolk Southern] was surely aware of the nature of U.S. Silica's slurry operations at the . . . plant, because Norfolk Southern track supervisors had been called to that facility on prior occasions to inspect the tracks." *Id.* at 28a. Thus, "the jury could infer that Norfolk Southern breached its duty of ordinary care by failing to inquire about the encasement of these pipes." *Id.*

3. The South Carolina Court of Appeals reversed the trial court's order denying Norfolk Southern's motion for judgment notwithstanding the verdict.[2] To the court of appeals, there was "no indication" that "Norfolk had any reason to know that U.S. Silica had slurry pipes running under its spur tracks." App., *infra*, 18a.

In reaching that conclusion, however, the court of appeals acknowledged that Norfolk Southern had never inspected the U.S. Silica property before the incident to ensure compliance with the AREA standards regarding encasing of pipes. The court stated in a footnote that "Norfolk's inspections of the [U.S. Silica spur] track *only* involved looking for problems with the track that would make the railroad car derail, such as making sure the dis-

[2] While the case was on appeal, Rogers settled his claims against U.S. Silica.

tance between the rails (or the gauge) was proper." *Id.* at 17a n.6 (emphasis added).

Despite that conceded fact, the court of appeals determined that, as a matter of law, Norfolk Southern had acted reasonably because, on the day of his injury, "Rogers was sent to inspect the hole on U.S. Silica's property and determine the dangerousness of the work site." *Id.* at 19a-20a. To the court, prior to that time, it was "impossible" for Norfolk Southern to have foreseen that this dangerous condition might exist at the U.S. Silica plant where the railroad's workers were sent to work. *Id.* at 19a.

4. After granting certiorari, the South Carolina Supreme Court affirmed the court of appeals' decision by a 3-2 vote. App., *infra*, 1a-10a.

Like the court of appeals, the South Carolina Supreme Court majority determined that Norfolk Southern discharged its duties to Rogers by acting reasonably on the day of the accident. Thus, the majority concluded that Norfolk Southern had no obligation to inspect the U.S. Silica property on which its employees frequently worked *before* the accident to determine whether the slurry pipes complied with the AREA standards. The majority did not dispute that Norfolk Southern had never inspected U.S. Silica's property for failure to adhere to the AREA regulations on encasing pipes. Nevertheless, the majority "fail[ed] to see how, in this instance, Norfolk Southern could have been any more prudent" because Rogers was "Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site." *Id.* at 7a.

To the majority, "Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site" and could not be expected to be "omniscient" about U.S. Silica's failure to comply with the AREA regulations and Norfolk Southern's own standards. *Id.* Accordingly, the majority held that Norfolk Southern was under no legal obligation to require a third party to

comply with industry and general engineering standards and thus provide Norfolk Southern employees with a safe place in which to work.

In dissent, Justice Burnett, joined by Justice Waller, viewed as irrelevant the majority's conclusion that there was no negligence in Norfolk Southern's actions in dispatching Rogers to the U.S. Silica site once it was informed of the danger at that location. Rather, they stressed that Norfolk Southern's non-delegable duty to provide a safe workplace required Norfolk Southern to inspect this site *previously*, which the jury could reasonably have found would have disclosed the dangerous condition created by the pipes: "Norfolk Southern's non-delegable duty required it [to] inspect the premises within the area of its responsibility for conditions injurious to its employees. This duty necessarily required it [to] be aware of conditions adjacent to the tracks which posed an immediate potential of danger to its employees. This Norfolk Southern failed to do." *Id.* at 9a. *See also id.* (describing photographic and other evidence that the existence of the slurry pipes under the rail tracks would have been detected if there had been an inspection).

REASONS FOR GRANTING THE PETITION

This case involves a split of authority between the South Carolina Supreme Court and multiple federal and state courts (including four federal circuits) on a significant and recurring issue under the FELA: whether railroads have a duty to inspect third-party premises where their employees work.

Although the existence of that conflict on this significant legal issue by itself justifies a grant of certiorari, review is particularly warranted in this case. Over many decades, this Court has vigorously enforced the "'humanitarian'" intent underlying the FELA. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997) (quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994)). It has done so in two key ways.

First, the Court has repeatedly rejected attempts to create escape hatches to employer liability for negligence that would "remove from the coverage of [the FELA] a significant area of railroad activity" or otherwise cabin the railroads' liability to employees.[3] In this regard, the Court unanimously held just last Term that permitting apportionment of damages between railroads and other parties (as opposed to joint and several liability) under the FELA would "handicap plaintiffs" and would thus be "inconsistent" with the FELA's "overall recovery facilitating thrust." *Norfolk & Western Ry. v. Ayers*, 123 S. Ct. 1210, 1225, 1227 (2003).

Second, the Court has steadfastly ensured that reviewing courts do not deny plaintiffs compensation for their injuries by invading the province of the jury in FELA cases. The Court has long stressed that it "is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of [the jury's] determination." *Rogers*, 352 U.S. at 509. The Court has thus granted either plenary review or summary reversal in a large number of FELA cases where a lower federal or state court has overstepped its proper function and usurped the authority of the jury.[4]

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[3] *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 7, 11 (1963) (railroad liable for injury of worker in loading another railroad's car); *see Atchison, T. & S.F. Ry.*, 480 U.S. at 564 (fact that injury was subject to arbitration did not deprive worker of rights under the FELA); *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 330 (1958) (railroads could not avoid liability by acting through agents "because justice demands that one who gives his labor to the furtherance of the enterprise" shall be compensated if injury results).

[4] *See, e.g., Meeks v. Georgia S. & F. Ry.*, 377 U.S. 405, 405 (1964) (per curiam) (summary reversal); *Rogers*, 352 U.S. at 509-10 ("The decisions of this Court after the 1939 amendments [to the FELA] teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.") (footnote omitted); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947) (reversing Nebraska Supreme Court where there was "a reasonable basis" for the jury verdict of liability).

This case implicates both lines of precedent. By declining to impose a duty to inspect the property of third parties, the South Carolina Supreme Court's decision wrongly immunizes a great deal of railroad conduct from FELA liability and will lead to many injuries and deaths that could be avoided if this Court made clear that railroads have an unequivocal duty to inspect for dangerous conditions *before* harm occurs.

By the same token, the South Carolina Supreme Court's 3-2 decision reflects an extraordinarily, and improperly, aggressive view of a reviewing court's role. The court concluded that there was not a "scintilla" of evidence on which a reasonable juror could have relied to find negligence and that the railroad would have had to be "omniscient" to discover the dangerous condition created by the uncased pipes. The record, however, demonstrated that the slurry pipes did not meet accepted industry safety standards; that in several places the pipes were above-ground and visible; and that a Norfolk Southern engineer testified that the company had reviewed the plans for the U.S. Silica sidetracks, which would have revealed the existence of the pipes. A jury could rationally credit that evidence, and, as in *Rogers* and the many other cases cited above, the Court should grant certiorari to align the South Carolina Supreme Court's decision with this Court's precedents regarding the highly circumscribed role of a court reviewing an FELA jury verdict that the railroad was negligent.

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF FEDERAL AND STATE COURTS ON A RECURRING AND IMPORTANT ISSUE OF FELA LIABILITY

A. The FELA Imposes A Duty To Inspect A Third Party's Property Where A Railroad Requires Its Employees To Work

Consistent with the established understanding of the FELA's broad remedial scope, this Court has long made

clear that a railroad's "nondelegable duty to provide its employees with a safe place to work" extends to circumstances where the employees "are required to go onto the premises of a third party over which the railroad has no control." *Shenker*, 374 U.S. at 7.

Shenker thus held that a railroad's non-delegable duty to create a safe workplace includes an obligation to "*inspect*" railroad cars with which employees are expected to work "*before* permitting [the] employees to work with them." *Id.* at 8-10 (emphases added). In that case, an employee of one railroad was loading mailbags onto a railcar owned by another railroad and was injured by a defective door on that car. Even though that particular railcar had just pulled into the station and the employer "lacked control or supervision" over that car, the plaintiff's employer was nonetheless liable because it had not inspected the car before the plaintiff was required to work on it. *See id.* at 10. In short, because the employer's "failure to inspect [was] uncontested," the Court held that the jury verdict should have been affirmed. *Id.*

In holding for the plaintiff railroad employee in *Shenker*, the Court relied in particular upon several prior cases dealing with the duty of a railroad to inspect third parties' railroad cars. *See id.* at 8-9 (citing and discussing *Baltimore & Potomac R.R. v. Mackey*, 157 U.S. 72 (1895), and *Texas & Pac. Ry. v. Archibald*, 170 U.S. 665 (1898)). *Shenker* explained that those cases established the "standard of care applicable to the use of cars belonging to a foreign railroad." 374 U.S. at 8.

Although *Shenker* addressed the duty to inspect a third party's railroad cars in particular, and relied upon case law dealing with that specific issue, the Court's explanation of its holding applies to any property with which, or on which, a railroad employee is required to work. That is how the federal courts of appeals have understood and applied *Shenker*. *See* pp. 12-15, *infra*.

As *Shenker* explains, the key fact there was that the railroad "required the petitioner to work with cars" be-

longing to another railroad. 374 U.S. at 10. Having done so without taking necessary "precautions" by inspecting the cars, the railroad could not escape liability no matter how brief a time the employee would work with the car, *see id.* ("the length of the sojourn is irrelevant to the duty owed to the employee"), and no matter whether it "control[led]" or "supervis[ed]" the car in question, *id.* The railroad's duty was either to undertake such inspections of third-party property or to "refus[e] to permit its employees to service" a car that was not under the railroad's control. *Id.*

In all relevant respects, this case is even stronger than *Shenker*. On numerous occasions, Rogers was required by Norfolk Southern to go to U.S. Silica's premises as part of his job. Indeed, Norfolk Southern's employees went onto U.S. Silica's premises almost daily. That being the case, Norfolk was required to take reasonable "precautions," including "inspect[ing]" that property for hazards, before its employees entered the U.S. Silica premises. *Id.* at 8, 10. Having failed to undertake such a reasonable inspection before allowing its employees on U.S. Silica's property or to inquire whether U.S. Silica had complied with AREA standards, Norfolk Southern could properly be held liable for the results of any dangerous conditions that could have been discovered and corrected if such an inspection had been done. *See id.*

In *Shenker*, as here, the railroad could not be "omniscient" as to the presence of defects on another railroad's car. In fact, the record showed that the railcar in question "had just pulled into the station." *Id.* at 7. Nor was there any reason to believe that the defendant railroad had acted improperly after it was informed of the defect in the car. Nevertheless, this Court had no difficulty finding that the jury's verdict was "required by any reasonable construction" of the FELA because the railroad had undertaken no inspection to discover defects before allowing its employee to work on the railcar. *Id.* at 10. Under *Shenker*, therefore, reversal is warranted.

B. The Decision Below Directly Conflicts With Numerous Decisions Of Federal And State Courts

Although *Shenker*'s precise holding deals with the duty to inspect railcars, a number of courts – including the Fourth, Fifth, and Eighth Circuits – have read *Shenker* to require courts to uphold jury findings of liability based on a more general understanding that a railroad has a duty to inspect third-party premises on which the railroad's employees will work. The Sixth Circuit has reached the same result under a theory that the third party's negligence is imputed to the railroad when the worker is injured on the third party's premises. The South Carolina Supreme Court, on the other hand, is joined by the Alabama Supreme Court in announcing a minority rule.

1. In *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72 (4th Cir. 1980), for example, the railroad employee was sent by the railroad to repair a machine on the property of a third party (Union Oil). In so doing, he fell into an uncovered hole (a drain culvert) located near the tracks. *See id.* at 74. The jury found the railroad liable under the FELA, and the Fourth Circuit affirmed on that point.[5] The Fourth Circuit held that the railroad's duty to provide its employees with a safe place to work included "the responsibility to inspect the premises where its employees will be working and to take reasonable precautions to protect its employees from possible danger." *Id.* at 75. As the Fourth Circuit explained, the plaintiff "had a right to assume that [the railroad] had taken reasonable precautions to eliminate potential hazards at the work site," even though that site was controlled by a third party and the hazard itself was "not hidden from the plaintiff." *Id.* In sum, in the Fourth Circuit, the law is that railroads must inspect third-party premises to which they send

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[5] The court of appeals separately reversed the district court judgment because of an error in the damages instructions. *See* 622 F.2d at 75-76.

their employees *before* the employee is sent to such a site. *See also Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) (reiterating that the "FELA imposes on the railroad carrier a duty to take reasonable precautions to inspect the workplace," but finding no liability where there was no evidence that inspection would have revealed a defect). Thus, had Rogers brought this suit in federal court in South Carolina, which would have applied *Cazad*, he would have prevailed.

The law is the same in the Eighth Circuit. In *Lockard v. Missouri Pacific Railroad*, 894 F.2d 299 (8th Cir. 1990), the plaintiff railroad employee was injured because of a dangerous condition on the property of a third party – in that instance, icy steps at a boarding house where the railroad had contracted for its workers to stay. The Eighth Circuit held that the railroad's non-delegable duty to provide a safe workplace "extends to the property of third parties" and, moreover, "includes an obligation to inspect the premises of the third party and to protect the railroad's employees from dangerous conditions." *Id.* at 303. The Eighth Circuit thus concluded that there was "sufficient evidence to support a finding that [the railroad's] negligence contributed" to the plaintiff's injury. *Id.* at 304.

The Fifth Circuit has likewise held that a railroad's duty to provide a safe workplace under the FELA creates "a positive duty to inspect and to discover defects" on property the railroad does not own. *Nivens v. St. Louis Southwestern Ry.*, 425 F.2d 114, 120 (5th Cir. 1970). In that instance, the plaintiff was injured in a derailment that occurred because of the negligent design of a track that was owned and had been designed by a third party. The court of appeals found that the railroad could reasonably be found negligent even if "it could not have known of the faulty design at its inception" because the railroad could have "inspect[ed]" the facility and "correct[ed]" the design or "refuse[d] to permit its employees from working upon" the railbed. *Id.*; *see also Williams v.*

National R.R. Passenger Corp., 161 F.3d 1059, 1063 (7th Cir. 1998) (liability exists under the FELA where a defect "could have [been] discovered upon inspection").[6]

And the Sixth Circuit has held that "[a] railroad is not relieved from liability because [a third party's] premises are unsafe or because of the existence of an unsafe condition brought about through the act of another and without fault, on the railroad's part." *Payne v. Baltimore & Ohio R.R.*, 309 F.2d 546, 549 (6th Cir. 1962). Articulating its rationale under a theory of imputed liability – *i.e.*, the third party's negligence is imputed to the railroad – the court reached exactly the same result as the post-*Shenker* federal courts of appeals: "[t]he fact that the spur track was on property not owned by [the railroad] cannot alter the duty of the [railroad]." *Id.*; *see also Empey v. Grand Trunk Western R.R.*, 869 F.2d 293, 296 (6th Cir. 1989) (similarly finding a duty to inspect the premises of a third party).

State courts have also issued rulings in conflict with the South Carolina Supreme Court in this case. *See Norfolk & Western Ry. v. Chittum*, 468 S.E.2d 877, 881 (Va. 1996) ("The employer also has a nondelegable duty to inspect its premises *and other areas* where its employees are required to work and to take reasonable precautions to protect its employees from possible danger.") (emphasis added); *Carr v. Union Pac. R.R.*, 803 So. 2d 427, 435 (La. Ct. App. 2001) ("[T]he scope of duty imposed under [the FELA] encompasses a duty on the part of the rail-

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[6] *See also Paul v. Genesee & Wyoming Indus., Inc.*, 93 F. Supp. 2d 310, 319 (W.D.N.Y. 2000) ("[A] jury could impute constructive notice to a railroad employer where the defective condition could have reasonably been discovered, but was not discovered due to the railroad's failure to inspect the relevant work area."); *Elston v. Consolidated Rail Corp.*, 762 F. Supp. 180, 185-86 (S.D. Ohio 1991) (railroad's non-delegable duty to provide safe workplace extends to common area maintained by third party – negligence alleged "is a failure to correct an unsafe condition under the control of a third-party").

roads to inspect even *third parties*' premises for possible hazards to their employees."), *writ denied*, 814 So. 2d 561, 563 (La. Apr. 26, 2002).

If this case had arisen in any of these other fora, the jury verdict in favor of petitioner Rogers would have been upheld. The court would have concluded that Norfolk Southern had "a positive duty to inspect and to discover defects from the date" it allowed its employees to work at the U.S. Silica site, *Nivens*, 425 F.2d at 120; *accord Lockard*, 894 F.2d at 303, and thus that Rogers "had a right to assume that [the railroad] had taken reasonable precautions to eliminate potential hazards at the work site," *Cazad*, 622 F.2d at 75.

2. In rejecting Rogers' appeal, the South Carolina Supreme Court announced a rule of law that "Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site." App., *infra*, 7a. The court determined that "Rogers was Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site." *Id.* Thus, regardless of the evidence showing the continuous uses of the third-party premises by Norfolk Southern and its prior failure to inspect those premises, the court below "fail[ed] to see how" Norfolk Southern could have been any more prudent. *Id.*

The South Carolina Supreme Court majority therefore applied a very different legal standard from the one adhered to by the courts cited above. To the 3-2 majority, the jury's verdict was not supported by a "scintilla" of evidence because Norfolk Southern could not "have been any more prudent" *after* the hole was discovered. *Id.* Because "[t]he law does not require" the railroad to be "omniscient" of hazards on the premises where it directed Rogers to inspect, the court concluded, Norfolk Southern was not "chargeable" with knowledge of the danger caused by the uncased pipes before Rogers arrived on the scene to conduct his inspection. *Id.*

The dissenting justices in the South Carolina Supreme Court, by contrast, properly understood that Norfolk Southern's "non-delegable duty required it [to] inspect the premises," and a reasonable juror could conclude that such an inspection would have led to the discovery of the dangerous condition, because "[p]hotographs and witness testimony" in the record show that "[t]he pipes were visible going into the ground adjacent to the track." *Id.* at 9a. As the South Carolina Court of Appeals acknowledged, Norfolk Southern never claimed to have made such an inspection of the entire pertinent premises – particularly the parts immediately adjacent to the tracks that would have revealed the slurry pipeline. *See id.* at 17a n.6 (acknowledging that Norfolk Southern had only inspected the track itself). Such an inspection would have led to the discovery that the slurry pipes did not comply with the governing AREA standards. A jury could reasonably have concluded – and the jury below *did* so conclude – that the railroad was negligent in failing to inspect all parts of U.S. Silica's premises where the railroad's employees worked.

Consistent with the decision below – and also in conflict with the clear majority rule – is the Alabama Supreme Court's judgment in *Seaboard System Railroad v. Coffee*, 565 So. 2d 35 (Ala. 1990). In that case, a railroad employee received a jury verdict for negligence against the railroad under the FELA, which the state supreme court reversed. *Id.* at 38. The worker was injured as he stepped off the train onto a third party's premises where the sandy terrain created a dangerous condition. *Id.* at 36. The Alabama Supreme Court held that it was reversible error for the trial court to have instructed the jury that "'the railroad does have a non-delegable duty to provide its employees with a safe place to work despite the fact that it may not own, control, or be under a primary obligation to maintain premises on which the employee is injured.'" *Id.* The court rejected the worker's contention that the case was controlled by *Shenker*, *id.* at 38, holding instead that *Shenker* did not alter the holding

of *Ward v. Atlantic Coast Line Railroad*, 362 U.S. 396 (1960) (per curiam). But *Ward* stands for an entirely different proposition – that a railroad worker injured on a third party's premises during his off-hours is not covered by the FELA. *Id.* at 397-98. Thus, like the South Carolina Supreme Court below, the Alabama Supreme Court appears to be confused about the applicable principles governing the railroad's duty to provide a safe workplace when its employees are required to work on a third party's premises.

In sum, as the South Carolina and Alabama courts are now directed to apply the federal standards created by the FELA, there is no duty to inspect third-party premises to find and to correct potentially dangerous conditions before injuries occur. In those states, a railroad has no duty to seek to *discover* dangerous conditions *before* they could cause harm, but only to follow up when it finds out that a specific dangerous condition might exist. That rule is flatly inconsistent with *Shenker* and the decisions of four federal circuits.

C. The State Supreme Court's Rule Harms Rail Workers By Impermissibly Narrowing The Scope Of The Railroad's Duty

The rule announced by the South Carolina Supreme Court significantly narrows the railroad's non-delegable duty to create a safe workplace, and would result in fewer dangerous conditions being discovered and more railroad workers being maimed or killed. As this Court has long recognized, Congress enacted the FELA because it was cognizant of the enormous human cost of the railroad business – the "physical dangers of railroading that resulted in the death or maiming of thousands of workers every year." *Gottshall*, 512 U.S. at 542. In 2002 alone, there were 6,800 work-related injuries and illnesses

among railroad workers.[7] The FELA's core intent is to shift the cost of that human suffering to employers by making them liable when their negligence "played any part, even the slightest, in producing the injury or death." *Rogers*, 352 U.S. at 506. Certiorari is warranted to clarify that the railroads' obligation to provide a safe workplace applies to a third party's premises where the railroad directs its employees to work.

II. THE SOUTH CAROLINA SUPREME COURT'S DECISION IMPERMISSIBLY EXPANDS A COURT'S ROLE IN REVIEWING JURY VERDICTS IN FELA CASES

The South Carolina Supreme Court's decision not only conflicts with the determinations of several federal courts of appeals; it is also wrong as to a reviewing court's role in FELA cases where a jury has found a railroad negligent under that statute.

A. The Decision Below Is Inconsistent With This Court's FELA Cases Affording Special Deference To Jury Verdicts

This Court has instructed that, under the FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506. Accordingly, "[j]udicial appraisal of the proofs" presented to a jury of an FELA employer's negligence is "narrowly limited to the single inquiry" whether the employer's negligence "played any part at all in the inquiry." *Id.* at 506-07.

Although the South Carolina Supreme Court purported to grant deference to the jury's determination, *see* App., *infra*, 5a, the court repeatedly disregarded evidence that a jury could reasonably credit in finding Norfolk Southern

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[7] This figure is based on a data query to a Bureau of Labor Statistics database. The data query page can be found at http://data.bls.gov/labjava/outside.jsp?survey=si.

at fault. In particular, the South Carolina Supreme Court declared that only "omniscien[ce]" could have given Norfolk Southern notice of the existence of the slurry pipes under the rail line – and thus the possible violation of the relevant industry standards – before the hole developed. *Id.* at 7a. The record amply supported a different conclusion. The jury was able to review, among other evidence: (1) photographs of the U.S. Silica premises showing that the pipes were visible; (2) testimony that the pipes were visible above ground for a quarter-mile; (3) testimony that Norfolk Southern reviewed the plans of all sidetracks, including the one on U.S. Silica's property, and that those plans would have shown pipes running under the tracks; and (4) testimony that the nature of the plant would have established a need to carry slurry in pipes under the tracks. R. 89-90, 114-15, 570, 1097-1106 (App., *infra*, 53a-56a, 62a-64a). A reasonable juror could readily find that these facts put Norfolk Southern on notice of the potentially dangerous conditions created by the uncased slurry pipes and thus that Norfolk Southern was "chargeable" with knowledge of the conditions where its employees were directed to work. App., *infra*, 7a.

By disregarding such facts and substituting its own belief that Norfolk Southern could not reasonably have known of the existence of this potential danger, the South Carolina Supreme Court majority "improperly invaded the function and province of the jury in this [FELA] case." *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 113 (1963). *See also Ellis*, 329 U.S. at 653 (holding that Nebraska Supreme Court erred in reversing jury verdict in FELA case). Accordingly, here, as in prior FELA cases, vigilance by this Court is necessary to vindicate Congress's intention "to secure the [plaintiff's] right to a jury determination." *Rogers*, 352 U.S. at 509. *See also Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946) (reversing lower court's decision overturning jury verdict where evidence supported theory that mail hook protruding from train caused plaintiff's death).

B. This Court Should Consider Summary Reversal

Contrary to the South Carolina Supreme Court's belief that it is enough to say that the railroad cannot be "omniscient" as to lurking dangers, App., *infra*, 7a, this Court's precedents establish that a railroad's duties to its employees under the FELA include undertaking reasonable inspections of a third party's property where employees will be working to discover and fix such defects before a worker is harmed. *See Shenker*, 374 U.S. at 10.

In reaching a contrary conclusion, the South Carolina Supreme Court did not discuss *Shenker* (even though petitioner had cited it), much less try to distinguish that binding determination from this Court. Nor did the state supreme court cite or discuss *Cazad* (also cited by petitioner), which offered the Fourth Circuit's view of federal law that would have governed in South Carolina. For that reason, this Court may also consider this case an appropriate candidate for summary disposition on the merits pursuant to Rule 16.1. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* 316 (8th ed. 2002) (noting that cases involving "appellate review of FELA jury verdicts" are a common example of the instances where the Court has granted summary reversal).

The many instances in which this Court has summarily reversed in FELA cases have involved a situation similar to that found here: an injured worker obtains a jury finding of the railroad's negligence, an appellate court overturns that verdict, and this Court summarily reverses. *See Meeks*, 377 U.S. at 405 (summary reversal where Court found sufficient evidence to support jury verdict of negligence); *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 15 (1959) (per curiam) (same); *Moore v. Terminal R.R. Ass'n*, 358 U.S. 31, 31 (1958) (per curiam) (same); *Honeycutt v. Wabash Ry.*, 355 U.S. 424, 424 (1958) (per curiam) (same); *Gibson v. Thompson*, 355 U.S. 18, 18 (1957) (per curiam) (same). Here, where the jury fairly understood the record to show that nothing close to "omniscience" was necessary

for the railroad to learn of the potentially dangerous condition, reversal is likewise warranted because "the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury." *Moore*, 358 U.S. at 31 (collecting authorities).

If this Court concludes that full briefing and argument on the merits is unnecessary in light of the egregious disregard of its precedents demonstrated by the South Carolina Supreme Court, it should summarily reverse.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the judgment of the South Carolina Supreme Court should be summarily reversed.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

No. 25720

JOHN DAVID ROGERS,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION,
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

[Decided Sept. 22, 2003]

Justice PLEICONES:

We granted certiorari to review the Court of Appeals' decision in *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 538 S.E.2d 664 (Ct.App.2000). We affirm as modified.

FACTS[1]

Norfolk Southern Corporation ("Norfolk Southern"), under contract with U.S. Silica ("Silica"), transports Silica's product over spur tracks owned by Silica. Silica runs slurry[2] through pipes running beneath the spur lines to a storage facility.

A slurry pipe ruptured two days before John David Rogers' ("Rogers") injury. Silica employees temporarily repaired the pipes, intending to replace them at a later

[1] A more extensive treatment of the facts can be found in the Court of Appeals' opinion. *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 538 S.E.2d 664 (Ct.App.2000).

[2] Slurry is an abrasive mixture of sand and water that can be pumped through a pipe. The slurry has a sandblasting effect on the pipes causing the pipes to be worn down over time.

date. Silica did not notify Norfolk Southern of the rupture.

On the day of Rogers' injury a Norfolk Southern train entered the Silica complex on a spur track. The Norfolk Southern crew, consisting of a conductor and an engineer, dismounted from the train for a break. They returned to discover a large hole beneath the track estimated to be between four to five feet deep and approximately eight to ten feet wide. The train engineer noticed a small stream of clear water at the bottom of the hole, which flowed outward from the direction of the Silica plant. The train conductor testified that no exposed pipe was visible in the hole. The train conductor asked Norfolk Southern to inspect the track to ensure the train could traverse it safely. Norfolk Southern sent Rogers, an assistant track supervisor, to inspect the hole.

Rogers testified that, upon arriving at the site, he could see the hole from 150 feet away but could not tell what caused the hole. Rogers' assistant testified to seeing "wet sand" around the hole. Norfolk Southern's head track inspector testified he knew a hole created by the failure of a water line would cause an inspector to be more cautious "than if it had just been water washed across the track or water leaking from a low pressure pipe, [because] it might cause a concave-type hole under the track rather than one that would go straight down."

As Rogers neared the hole, the ground shifted beneath him. Rogers jerked backwards to avoid falling and immediately felt pain in his back. Rogers sought medical treatment and was diagnosed with a herniated disc, which resulted in pain in his back and his left leg. Rogers attempted to return to work after surgery, but he has work restrictions on lifting, bending, stooping, and twenty percent impairment to his lumbar spine.

Rogers filed suit against Norfolk Southern under FELA, alleging Norfolk Southern was negligent in failing to provide him with a reasonably safe place to work. Rogers

also filed suit against Silica for common law negligence. The jury returned a $3,000,000 verdict against Silica and Norfolk Southern, apportioning 30% of the verdict to Norfolk Southern and 70% to Silica. Following the verdict, Norfolk Southern's motion for judgment notwithstanding the verdict (JNOV) was denied. The Court of Appeals reversed.

ISSUES

I. Did the Court of Appeals err in applying a state standard in reviewing a trial court's denial of Norfolk Southern's Motion for JNOV in a case premised on federal law?

II. Did the Court of Appeals err in reversing the trial court's denial of Norfolk Southern's Motion for JNOV?

I

Standard for JNOV

The Court of Appeals issued its opinion in this case before we decided *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002) in which we held state trial courts hearing a federal claim must review motions for a new trial under a federal standard. In *Norton*, this Court noted state courts have concurrent jurisdiction to hear Federal Employers Liability Act ("FELA") claims. *See id*; 45 U.S.C. §§ 51, *et seq.* We further noted a state court trying a FELA action is controlled by federal substantive law and state procedural law. Because a motion for a new trial involves questions of the sufficiency of evidence, we held state courts must apply federal, not state, standards in reviewing such motions. *Norton v. Norfolk Southern Ry. Co., supra.*

A Motion for JNOV[3] requires a court to determine the sufficiency of the evidence. Therefore, a state court pre-

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[3] We observe that the federal rules do not provide specifically for a Motion for JNOV. The federal rules do allow for a Motion for Judgment as a Matter of Law. *See* Rule 50, FRCP. As a practical matter South Carolina's Motion for JNOV and the federal Motion for Judgment as a Matter of Law are the same.

siding over a FELA action must apply federal rules in deciding a Motion for JNOV. *Cf. Norton v. Norfolk Southern Ry. Co., supra.*

The Court of Appeals applied the state standard of review and concluded Rogers presented no evidence to support the jury's finding that Norfolk Southern was negligent.[4] The Court of Appeals erred by failing to apply the federal standard, applicable to both trial and appellate courts, which is:

> the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be 'of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party . . . .' a 'mere scintilla of evidence' is not sufficient to withstand the challenge.

Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir.1988) (internal citations omitted). In other words, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957) (citation omitted). However, before the case may be properly left to the jury there must be more than a

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[4] The Court of Appeals wrote the state standard required a trial court to:

> view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. [Appellate courts] will reverse the trial court only when there is no evidence to support the ruling below.

Rogers, 343 S.C. at 58, 538 S.E.2d at 668 (quoting *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)).

scintilla of evidence establishing defendant's liability. *Brady v. Southern Ry.*, 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943) ("the weight of the evidence under . . . [FELA] must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . . .").

Both the state and federal standards require a trial judge to view the evidence in the light most favorable to the non-moving party. However, under the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling.

In contrast, under the federal standard both the trial and appellate courts must ask whether a fair, impartial, and reasonable juror could return a verdict for the non-moving party. To survive the motion the non-moving party must have presented more than a scintilla of evidence to establish his claim. In ruling on a Motion for JNOV in a FELA action, a state court must ask whether more than a scintilla of evidence was presented which "justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R. Co., supra.*

II

Norfolk Southern's Motion for JNOV

Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party. *See Norfolk Southern Ry. Co. v. Trimiew*, 253 Va. 22, 480 S.E.2d 104 (1997); *McGraw v. Norfolk & Western Ry. Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997); *Schrier v. Indiana Harbor Belt R. Co.*, 102 Ill.App.3d 855, 58 Ill.Dec. 262, 430 N.E.2d 204 (1981). Norfolk Southern's duty to provide a safe working environment extends only to foreseeable dangers. *Brown v.*

CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir.1994) (quoting *Atlantic Coast Line R. Co. v. Craven*, 185 F.2d 176, 178 (4th Cir.1950) ("An employer has a duty to provide his employees a safe place to work, but this duty cannot be absolute. Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees.")); *Brown*, 18 F.3d at 250 (an employer "may not be held liable if it had no reasonable way of knowing that the hazard, which caused [Plaintiff's] injury, existed.").

Congress mandated courts construe FELA provisions liberally in favor of injured railroad workers. *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Although FELA is to be liberally construed, this "does not mean that it is a workers' compensation statute. [The U.S. Supreme Court has] insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'" *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994). An employee may recover under FELA only upon proving the employer's negligence contributed, in whole or in part, to the worker's injury. *See* 45 U.S.C. § 51 (a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier"). Plaintiffs, even under FELA, must prove the traditional common law elements of negligence: duty, breach, causation and damages. *See Brown, supra.* Reasonable foreseeability of harm is essential to a FELA claim. *See Brown*, 18 F.3d at 249.

Rogers was sent to the track on U.S. Silica's premises to inspect the track and report any problems or damages found, and advise his supervisors of any necessary repairs. On the day Rogers was injured, Rogers was sent to the track specifically to inspect the hole that was discovered by the conductor and engineer. To prevail on a

FELA negligence claim, Rogers must prove "duty, breach, foreseeability, and causation." *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir.1990). Norfolk Southern had a duty to provide its employees with a safe workplace. *Id.* Nevertheless, "[t]he employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated." *Isgett v. Seaboard Coast Line R.R. Co.*, 332 F. Supp. 1127, 1139 (D.S.C.1971).

We fail to see how, in this instance, Norfolk Southern could have been any more prudent. Rogers was Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site. Rogers' job was to inspect the area around the track and to inform Norfolk Southern of any danger.[5] We agree with the Court of Appeals that Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site. *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 61, 538 S.E.2d 664, 669 (Ct.App.2000). Norfolk Southern was not, therefore, negligent in any particular in dispatching Rogers to inspect the site.

The law does not require that employers be omniscient, only that they exercise reasonable care. Rogers was the agent of Norfolk Southern entrusted with informing the company of dangers in the Norfolk Southern workplace. No more than a mere scintilla of evidence, if that, was adduced at trial from which the negligence of Norfolk Southern could be inferred. We conclude that a fair, impartial and reasonable juror could not have returned a verdict against Norfolk Southern. The Court of Appeals

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[5] *Cf. Hurley v. Patapsco & Back Rivers R.R. Co.*, 888 F.2d 327 (4th Cir.1989) (Directed verdict was proper when appellant was only employee qualified to operate lathe, and "without notice from appellant as to possibly dangerous conditions not evident to a layperson, appellee had no opportunity to correct these conditions and cannot be found negligent").

arrived at the correct result as to all allegations of negligence – albeit through application of the incorrect standard.

We therefore AFFIRM AS MODIFIED the Court of Appeals' decision.

MOORE, A.C.J., and Acting Justice James C. Williams, Jr., concur.

BURNETT, J., dissenting in a separate opinion in which WALLER, J., concurs.

Justice BURNETT:

I respectfully dissent. The evidence presented by Rogers is more than sufficient to satisfy the federal "more than a mere scintilla" standard.

> Under the federal standard, applied alike at trial and on review, the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be 'of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party. . . .' A 'mere scintilla of evidence' is not sufficient to withstand the challenge.

Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir.1988) (internal citations omitted).

A scintilla is defined as "a trace" of evidence. Black's Law Dictionary 1347 (7th ed.1999).

The majority concludes Norfolk Southern was not negligent in dispatching Rogers to inspect the site. I agree. The mere dispatch of Rogers to the site was not negligent.

In my opinion, however, Norfolk Southern was negligent in failing to provide Rogers with a safe place to work. As noted by the majority, Norfolk Southern had a non-

delegable duty to provide Rogers a safe place to work, even when Rogers was working on the property of a third party. *See Norfolk Southern Ry. Co. v. Trimiew*, 253 Va. 22, 480 S.E.2d 104 (1997); *McGraw v. Norfolk & Western Ry. Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997); *Schrier v. Indiana Harbor Belt R. Co.*, 102 Ill.App.3d 855, 58 Ill.Dec. 262, 430 N.E.2d 204 (1981).

Viewing the testimony and its inferences in the light most favorable to Rogers as we are required to do, Norfolk Southern was negligent in failing to provide a safe place for Rogers to perform his work. Norfolk Southern's non-delegable duty required it inspect the premises within the area of its responsibility for conditions injurious to its employees. This duty necessarily required it be aware of conditions adjacent to the tracks which posed an immediate potential of danger to its employees. This Norfolk Southern failed to do.

The convex hole created beneath the Norfolk Southern tracks resulted from the rupture of slurry pipes which ran beneath the tracks. The pipes were visible going into the ground adjacent to the track and emerging from the ground on the opposite side of the track. Although the installation of the pipes was not disclosed to Norfolk Southern, the pipes were not concealed from view. Photographs and witness testimony show the entry of the slurry pipes into the ground twenty feet from the spur track. It was clearly foreseeable that a dangerous condition existed adjacent to Norfolk Southern's tracks.

In my opinion, more than a mere scintilla, a trace, of evidence was introduced establishing Norfolk Southern knew or, in the exercise of ordinary care, should have known the conditions at Silica posed a danger to its employees. Accordingly, under FELA standards, Rogers is entitled to prevail. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) (under FELA, an employee prevails if he establishes "that employer negligence played any part, even the slightest, in

producing the injury or death for which damages are sought.").

The majority opines no fair, impartial, and reasonable juror could have returned a verdict against Norfolk Southern. The record, however, is devoid of evidence the jury which returned the verdict against Norfolk Southern was unfair, partial, or unreasonable. Instead, Rogers presented this jury more than a mere scintilla of evidence Norfolk Southern breached its non-delegable duty, resulting in injury to him.

I would REVERSE the Court of Appeals' decision.

WALLER, J., concurs.

APPENDIX B

COURT OF APPEALS OF SOUTH CAROLINA

No. 3248

JOHN DAVID ROGERS,
Respondent,

v.

NORFOLK SOUTHERN CORPORATION,
NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

[Decided Oct. 2, 2000]

CURETON, Judge:

This appeal arises from claims filed by John David Rogers (Rogers) against his employer Norfolk Southern (Norfolk) under the Federal Employer's Liability Act (the FELA)[1] and against the U.S. Silica Company (U.S. Silica) for common law negligence. Following the trial of this case, the jury returned a verdict of $3,000,000, apportioning thirty percent to Norfolk and seventy percent to U.S. Silica. On appeal, Norfolk argues: 1) Rogers should not recover under the FELA because Norfolk was not negligent; 2) Rogers's negligence was the sole cause of his injuries; 3) the verdict was excessive; 4) the court erred in omitting a jury charge regarding the taxability of the award; and 5) the court erred in holding post-trial that the jury's apportionment of damages was not binding on the parties. We reverse.

[1] The FELA subjects every common carrier by railroad engaging in interstate commerce to liability to employees injured as a result of the carrier's negligence. *See* 45 U.S.C. § 51, *et seq.* State courts have concurrent jurisdiction with federal courts in FELA suits. 45 U.S.C. § 56.

FACTS

Rogers, an assistant track supervisor for Norfolk, was injured while inspecting a hole that appeared around two sets of railroad sidetracks on U.S. Silica's premises. Generally, Rogers's duties were to inspect Norfolk's tracks in his assigned work area, appraise any problems or damage found, and advise his supervisors of necessary repairs.

On the day Rogers was injured, his supervisor sent him to inspect a large hole under the tracks on U.S. Silica's premises to see whether the tracks were safe to traverse. A Norfolk train engineer and conductor discovered the hole upon their return from a lunch break. The hole was approximately four to five feet deep, over eight feet across, with steep sides, and somewhat curved in on one side so as to cause the ground above to be undermined. The train engineer and conductor also reported the hole to at least two U.S. Silica employees who made no comment or explanation concerning the cause of the hole or any prior problems in the area.

Two days earlier, the underground slurry pipe that ran below the railroad tracks blew out.[2] When the blowout occurred, U.S. Silica employees bolted a temporary band over the pipe and filled in the hole caused by the blowout.

When Rogers arrived to inspect the hole, he could see the hole from about 150 feet away. He testified that he had no idea what could have caused the hole when he first

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[2] Slurry is sand that has been mixed with water so that it can be pumped through a pipe. It has a "sandblasting" effect, however, on the pipes through which it is pumped. This sandblasting effect causes the plastic pipes to wear out. Once a pipe springs a leak, it is a certainty that other leaks will appear soon and the entire pipe must be replaced. Normally, slurry is pumped through the pipe, but sometimes U.S. Silica's employees wash out the slurry line by pumping pure water through it. If the pipe is not encased within another protective pipe and has a blowout while water is being pumped through it, a hole will form in the sandy ground above the pipe and the ground will eventually cave in. Apparently, this is what caused the hole Rogers was sent to inspect.

observed it. Rogers could not see that some of the ground near the hole was undermined because of the manner in which it was undermined and the direction from which he approached the hole. Rogers told his assistant to "stand back" as he went to inspect the hole. Walking on the steel rails and track structure, Rogers stood within two to three feet from the hole. As Rogers attempted to look into the hole, the ground began to give way under his right foot. When he felt the ground giving way, Rogers jerked back from the hole to catch himself, twisted, and immediately felt pain in his back. Rogers reported the accident to his supervisor and went home.

Upon seeking medical treatment for back and left leg pain stemming from the incident, Rogers was diagnosed with a herniated disc. Surgery was performed to remove the ruptured disc, but the surgery did not relieve Rogers's leg pain. Rogers attempted to return to work after the surgery, but Norfolk would not permit him to do so. At the time of trial, Rogers had held five different jobs, none of which offered benefits and salary comparable to what he received at Norfolk.

Rogers's prognosis was described by Dr. John Eugene Alexander, an orthopedist, as poor. Although Rogers had sustained back injuries before this incident[3], he had been able to return to work with restrictions. Rogers was working well within those restrictions without difficulty until this incident occurred. Because of this injury, Rogers has work restrictions on lifting, bending, and stooping, as well as an additional twenty percent impairment to his lumbar spine.[4] Dr. Alexander opined that Rogers will never be able to do the type of work he did in the past or to resume his previous recreational activities, and that his condition will progressively worsen with

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[3] Rogers made FELA claims on both of these injuries, and both claims were resolved.

[4] Rogers already had a thirty percent impairment to the back as a result of the two prior back injuries.

time. At the time of trial, Rogers suffered from depression and had problems sleeping because of constant pain.

As a result of his accident and injuries, Rogers filed suit against Norfolk under the FELA, alleging Norfolk was negligent in failing to provide him with a reasonably safe place to work. Rogers also brought suit against U.S. Silica for common law negligence, alleging U.S. Silica had negligently failed to maintain its facility, grounds, and property in a reasonably safe and suitable condition for business invitees. Rogers also alleged U.S. Silica negligently failed to warn him of the dangerous and hazardous condition of its facility, grounds and property. U.S. Silica and Norfolk answered with general denials and asserted the affirmative defense of Rogers's contributory negligence. Norfolk also asserted release, stemming from Rogers's execution of a release in 1990 and one in 1995, and failure to mitigate damages as defenses. Norfolk also alleged an indemnity cross-claim against U.S. Silica.

The case was heard by a judge and jury in a five-day trial. At the close of the evidence, both U.S. Silica and Norfolk moved for directed verdicts. The trial court denied the motions. The jury returned a verdict for Rogers in the amount of $3,000,000 actual damages. The jury apportioned thirty percent of the verdict to Norfolk ($900,000) and seventy percent to U.S. Silica ($2,100,000). The jury found no negligence on Rogers's part. Following the return of this verdict, U.S. Silica and Norfolk moved for judgment notwithstanding the verdict and, alternatively, for a new trial or new trial *nisi remittitur*. The trial court denied these motions. Both defendants then moved for reconsideration on various grounds. Those motions were also denied. This appeal followed.[5]

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[5] U.S. Silica also brought an appeal of the verdict before this Court. However, during the pendency of the appeal, Rogers and U.S. Silica entered into a settlement agreement and the appeal was withdrawn.

LAW/ANALYSIS

In an action at law on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

Norfolk argues the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) because no issues of fact existed as to whether Norfolk was negligent. We agree.

> In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. This Court will reverse the trial court only when there is no evidence to support the ruling below.

Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

Under the FELA, a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. The FELA requires that liability arise from negligence which causes the employee's injury. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943). "[U]nder the FELA, 'plaintiffs are still required to prove traditional common law elements of negligence: duty, breach, foreseeability, and causation.'" *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 249 (4th Cir.1994) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir.1987)); *see also Lyles v. Alabama State Docks Terminal Ry.*, 730 So.2d

123, 124 (Ala.1998) ("To prevail in a FELA action, the plaintiff must prove the traditional common-law elements of negligence: duty, breach of duty, foreseeability, and causation.").

> The [history] has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the "vanishing point." While it is still undoubtedly true that there must be some shreds of proof both of negligence and of causation, and that "speculation, conjecture, and possibilities" will not be enough, there appears to be little doubt that under [FELA] jury verdicts for the plaintiff can be sustained upon evidence which would not be sufficient in the ordinary negligence action.

Norton v. Norfolk Southern Ry. Co., 341 S.C. 165, 533 S.E.2d 608 (2000) (quoting W. Page Keeton et al., *Prosser & Keaton on Torts* § 80, at 579) (alterations in original).

Rogers does not allege he was injured by any activity or instrumentality of Norfolk. Rather, he contends Norfolk sent him to an unreasonably unsafe place to work. "Under the FELA, an employer has a nondelegable, continuing duty to exercise reasonable care in furnishing its employees a safe place to work." *Norfolk Southern Ry. Co. v. Trimiew*, 253 Va. 22, 480 S.E.2d 104, 106 (1997); *see also Crawford v. Norfolk & W. Ry. Co.*, 901 S.W.2d 252, 254 (Mo.Ct.App.1995); *McGraw v. Norfolk & W. Ry. Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997). "This duty exists even when the employees are on the premises of a third party over which the employer has no control." *Schrier v. Indiana Harbor Belt R. Co.*, 102 Ill.App.3d 855, 58 Ill.Dec. 262, 430 N.E.2d 204, 207 (1981) (citations omitted).

The duty of providing a reasonably safe place to work does not require the elimination of all dangers, but it does require the elimination of the dangers which could be removed by the exercise of reasonable care on the part of the employer. *Crawford*, 901 S.W.2d 252. The employee needs only to show that he was injured because of an un-

safe condition that could have been reasonably removed by the employer, and that the employer's negligence played any part, even the slightest, in producing the employee's injury. *See* Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*; *Kaminski v. Chicago River & Indian R. Co.*, 200 F.2d 1 (7th Cir.1952); *Trimiew*, 480 S.E.2d at 106 ("... plaintiff's proof must justify with reason the conclusion that an employer's negligence played any part, even the slightest, in producing the injury for which damages are sought.").

Norfolk contends that it had no knowledge, actual or constructive, that the underground slurry pipe which caused the hole was installed beneath U.S. Silica's spur track[6], and, therefore, was not negligent in sending Rogers to the site. We agree with Norfolk.

Reasonable foreseeability of harm is an essential ingredient of FELA negligence. "[The railroad] may not be held liable if it had no reasonable way of knowing that the hazard, which caused [the plaintiff's] injury, existed." *Brown*, 18 F.3d at 250. "Thus ... the plaintiff must show circumstances which a railroad, in the exercise of due care, could have reasonably foreseen as creating a potential for harm." *McGraw*, 500 S.E.2d at 305. "Whether a particular danger was foreseeable ... is a fact issue and, 'as with all factual issues under the FELA, the right of the jury to pass on this issue must be liberally construed.'" *Id.* (quoting *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824, 826 (1994)). However,

> under the FELA, the weight of the evidence must exceed a scintilla before the case properly may be left to the jury's discretion. (Citations omitted). If, without

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[6] The evidence in the record establishes without contradiction that U.S. Silica owns and maintains this spur track. Norfolk used the track to reach the industry from its main line. Norfolk's inspections of the track only involved looking for problems with the track that would make the railroad car derail, such as making sure the distance between the rails (or the gauge) was proper.

> weighing the credibility of the witnesses, the evidence supports "but one reasonable conclusion as to the verdict," the court should decide the matter, thus saving the result "from the mischance of speculation over legally unfounded claims."

Trimiew, 480 S.E.2d at 108 (quoting *Stover v. Norfolk & W. Ry. Co.*, 249 Va. 192, 455 S.E.2d 238 (1995) (quoting *Brady*, 320 U.S. at 479-80, 64 S.Ct. 232)).

In its order addressing Norfolk's post-trial JNOV motion, the trial court found Norfolk had constructive notice of the slurry pipes underneath the spur tracks at the U.S. Silica plant. The court determined that Norfolk was familiar with railroad industry standards promulgated by the American Railroad Engineering Association (AREA). These standards require portions of pipes running under railroad tracks to be encased and require industries to notify a railroad if they want to install pipes beneath any track whether owned by the railroad or the industry. Additionally, the court determined Norfolk was "surely aware of the nature of U.S. Silica's slurry operations" at the plant site because track supervisors had inspected the tracks at the site before. The court concluded that "[t]hese facts alone provide sufficient basis to infer that Norfolk Southern had constructive notice of the presence of slurry pipes underneath the spur track at the U.S. Silica plant," and therefore, the jury could infer that Norfolk had breached its duty of ordinary care by failing to inquire about the encasement of these pipes.

However, there is no indication from the record that Norfolk had any reason to know that U.S. Silica had slurry pipes running under its spur tracks, much less that these pipes were not encased as required by the AREA standards and by general engineering standards. Even when the conductor found the hole on the afternoon in question, none of U.S. Silica's personnel made any mention of the slurry pipes below the tracks or that such a pipe under the track had burst two days before this incident. Norfolk cannot be expected to know the operational

details of a sand plant or of the placement of pipes it did not know even existed.

We hold it was not reasonably foreseeable that Rogers would be injured by inspecting the track or a hole under the tracks at this location. Unless a Norfolk employee saw or knew of the prior pipe leaks, or at least knew that pipes were in the ground beneath the tracks, it is impossible for Norfolk to have had actual or constructive knowledge of any danger at this location. "Events too remote to require reasonable prevision need not be anticipated." *Brady*, 320 U.S. at 483, 64 S.Ct. 232.

Additionally under the FELA, an employer's "'. . . conduct may become unreasonable if the employer, after being informed that a condition is potentially dangerous, fails to investigate' and, if necessary, correct the problem." *Gallose v. Long Island R. Co.*, 878 F.2d 80, 85 (2d Cir.1989) (quoting *Mohn v. Marla Marie, Inc.*, 625 F.2d 900, 902 (9th Cir.1980)).

> The employer must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. But even under the FELA, an employee still must establish that the employer was guilty of some act of negligence in order to recover.

Trimiew, 480 S.E.2d at 106 (citations omitted). The degree of care a railroad must exercise is "commensurate with the danger reasonably to be anticipated." *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527 (5th Cir.1951).

Rogers was Norfolk's investigator and the Norfolk employee most familiar with the U.S. Silica site.[7] In fact,

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[7] In fact, Rogers had inspected this spur tract on numerous prior occasions. Rogers testified that he had visited the site approximately once a month since he was assigned to the territory eighteen months before his injury.

Rogers was sent to inspect the hole on U.S. Silica's property and determine the dangerousness of the work site. Rogers was not required to disregard any of his doctor's earlier recommendations about limiting his physical activities in his position as investigator. Given Norfolk's lack of knowledge concerning the nature of the hole, it could not have provided Rogers with any warnings that would have prevented the harm to Rogers.

Finally, Rogers asserts Norfolk was negligent in failing to procure U.S. Silica's execution of the railroad's standard sidetrack agreement. Norfolk's predecessor repeatedly asked U.S. Silica's predecessor to execute the sidetrack agreement, but the agreement was never signed. Rogers maintains U.S. Silica's and its predecessor's refusal to execute the sidetrack agreement should have given Norfolk constructive notice that U.S. Silica was not complying with the AREA standards. However, Norfolk had no reason to suspect that U.S. Silica's refusal to sign the sidetrack agreement stemmed from its failure to encase the pipes below the tracks in blatant violation of the industry's standards.[8]

Rogers also maintains, absent the sidetrack agreement, U.S. Silica was under no obligation to comply with the railroad's standards. When cross-examined by U.S. Silica's attorney, Rogers's expert at trial agreed that U.S. Silica was under no obligation to abide by the AREA standards if Norfolk never required that they do so. In closing argument, Rogers argued that if Norfolk had refused service until the sidetrack agreement was signed, U.S. Silica would have signed the agreement. Rogers maintains that if U.S. Silica had signed the agreement, it would have

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[8] Correspondence from U.S. Silica's predecessor to Norfolk's predecessor indicates that the industry's failure to execute the sidetrack agreement was unrelated to the unencased pipes below the spur tracks. According to the correspondence, the industry wanted the railroad to modify the paragraphs in the sidetrack agreement addressing use of the spur track by third parties, close clearances, indemnification of the railroad's mistakes, and the right to repair the track.

abided by the regulations and encased the pipes, thereby avoiding Rogers's injury. Therefore, Rogers argues, it was negligent for Norfolk to provide services to U.S. Silica when it had no assurances that the spur track would be operated in accordance with railroad regulations. Rogers further argues his injury would have been avoided if Norfolk had refused to operate the spur track until the sidetrack agreement was executed. We disagree.

Even if Norfolk should have insisted that U.S. Silica execute the sidetrack agreement, the causal connection between Norfolk's failure to do so and Rogers's injury is extremely tenuous. The evidence showed U.S. Silica knew about the railroad's regulations, but still failed to comply with them. U.S. Silica's former plant manager, George Foster, testified he knew the company was supposed to notify the railroad before putting pipes under the tracks. He also testified to knowing that, under the railroad's rules, pipes going under industry tracks should be encased. Furthermore, encasing pipes which are located below traversed areas is not just a railroad industry standard, but is a general principle of civil engineering according to Rogers's expert. It is improbable that U.S. Silica would have complied with the standards of the sidetrack agreement if it had been executed. The execution of the sidetrack agreement would have established Norfolk's right to indemnification pursuant to the agreement.[9] It would not have provided Norfolk with any additional assurance that U.S. Silica would abide by the railroad's standards. *See Norton v. Norfolk Southern Ry. Co.*, 341 S.C. 165, 533 S.E.2d 608 (2000) (quoting W. Page Keeton et al., *Prosser & Keaton on Torts* § 80, at 579) ("[T]here must be some shreds of proof both of negligence and of causation, and [ ] speculation, conjecture, and possibilities

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[9] *Cf. Illinois Cent. Gulf. R. Co. v. Crown Zellerbach Corp.*, 859 F.2d 386 (5th Cir.1988); *Cazad v. Chesapeake and Ohio Ry. Co.*, 622 F.2d 72 (4th Cir.1980); *Missouri Pac. R.R. Co. v. International Paper Co.*, 618 F.2d 492 (8th Cir.1980).

[are] not [ ] enough."). Because there is no causal connection between Norfolk's failure to get U.S. Silica to sign the sidetrack agreement and Rogers's injury, Norfolk has not been shown to be negligent.

CONCLUSION

Considering the evidence in the light most favorable to Rogers, the only reasonable inference that can be drawn from the evidence in the record is that there was no negligence on the part of Norfolk. Therefore, the trial court erred in denying Norfolk's motion for judgment notwithstanding the verdict.[10]

For the foregoing reasons, the order of the circuit court is REVERSED.

GOOLSBY and CONNOR, J.J. concur.

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[10] Because of the disposition of the above issue, we find it unnecessary to address Norfolk's remaining issues on appeal.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

[May 13, 1997]

ORDER

The above-entitled action was tried during the December 2, 1996 term of Common Pleas Court for Fairifield County. All parties are undoubtedly familiar with the facts of this case, so the Court will dispense with a lengthy recitation. Suffice it to say that after a five day trial, the jury returned a verdict for the Plaintiff, John David Rogers ("Roger[illegible]"), in the amount of three (3) million dollars ($3,000,0[illegible]00). In the verdict form, the jury allocated negligence in the following proportions: Plaintiff-0%; Defendant Norfolk Southern Railway Company-30%; and Defendant U.S. Silica Company-70%.

The issues presently before the Court come via the following post-trial motions by the Defendants:

1) Defendant U.S. Silica's ("U.S. Silica") Motion for Judgment Notwithstanding the Verdict pursuant to South Carolina Rules of Civil Procedure 50, or in the alternative, a motion for a New Trial absolute pursuant to South Carolina Rules of Civil Procedure 59.

2) Defendant Norfolk Southern Railway Company's ("Norfolk Southern") Motion for Judgment Notwithstanding the Verdict, or in the alternative, either Motion for a New Trial Absolute or Motion for a New Trial *nisi remittitur*, AND a motion for a new trial based on the Court's failure to charge its requests numbers 5, 11, 14, 16, 18, 20, 22, 26, and 32.

These matters were argued before the Court in Union, South Carolina on December 11, 1996, with all parties represented by counsel. At that time the Court requested that each party submit proposed orders addressing their respective positions. The last proposed order was finally received on February 25, 1997. After carefully considering these proposed orders, and based on the forgoing, each of the Defendants' motions are hereby respectfully DENIED.

I. U.S. SILICA'S AND NORFOLK SOUTHERN'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. U.S. SILICA'S JNOV MOTION

First, U.S. Silica and Norfolk Southern argue that the jury's verdict in this case is contrary to the weight of the evidence and move for Judgment Notwithstanding the Verdict. Specifically, U.S. Silica challenges the sufficiency of the evidence in its exceptions #1 through #8. As the "thirteenth juror" entrusted with the task of ensuring that justice prevails, the Court has the limited authority to grant a new trial upon the facts when the evidence so dictates. *Vinson v. Hartley*, ____S.C.____, ____S.E.2d____ (Ct. App. Opinion No. 2572, Filed October 14, 1996). In ruling on a JNOV motion, the evidence must be considered in the light most favorable to the non-moving party. *Graham v. Whitaker*, 282 S.C. 383, 321 S.E.2d 40 (1984). Applying this standard of review, the instant case does not present an occasion to disrupt the jury's verdict.

First, the Court finds that all questions of fact regarding the alleged negligence of U.S. Silica were properly submitted to the jury. Generally, a landowner owes a

duty to invitees to maintain his premises in a reasonably safe condition, or to at least warn of hidden or latent dangers on his premises. *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969). Viewing the evidence in the light most favorable to Rogers, the Court finds that more than one inference regarding U.S. Silica's breach of this duty could be drawn. Moreover, this Court finds that the verdict itself is wholly consistent with such inferences. Likewise, the nature and extent of Rogers' injuries resulting from the 1993 incident (ie. the aggravating role of Rogers' prior back injuries and his degenerative disc disease), as well as the issue of his contributory negligence, were determinations for the jury. Its subsequent findings are consistent with the evidence. Finally, this Court finds that the verdict does not reflect any discernible confusion on the part of the jury regarding the law of this case. The Court will note that it took great pains to ensure that its instructions were clear and comprehensive. Therefore, this Court finds no merit in exceptions #1 through #8 contained in U.S. Silica's motion.

Nevertheless, the Court would like to take this opportunity to specifically address U.S. Silica's exceptions #2 and #30. In these exceptions, U.S. Silica alleges that the Court erred by submitting the issue of whether or not the "wash-out" was an open and obvious danger to the jury. As noted earlier, a landowner generally has a duty to warn or protect invitees of hidden dangers or conditions on his land of which the landowner knows or could know through the exercise of reasonable care. *Rogers v. Scyphers*, 251 S.C. 128, 161 S.E.2d 81 (1968). In its motion for summary judgment, its motion for directed verdict, and now its motion for a new trial absolute, U.S. Silica argues that the hole, or "wash-out," on its property was an open and obvious defect or condition as a matter of law, and therefore, U.S. Silica had no duty to warn Rogers of such danger. *See Callander v. Charleston Doughnut Corp.*, 406 S.E.2d 361 (S.C. 1991). In *Callander* the Supreme Court adopted the "no duty" rule of Section 343(A)

of the Restatement (Second) of Torts, stating that a landowner has no duty to warn in invitee of conditions on his premises "whose danger is known obvious" to the invitee. One of the touchstone elements of this "no-duty" rule as it has been applied in South Carolina is that the invitee must fully *appreciate* the nature and extent of the danger to which he voluntarily exposes himself. *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988). To fully appreciate a danger the invitee must have knowledge of the facts constituting the dangerous condition. *Id.*

In the instant case, while the hole itself was undoubtedly open and obvious, the jury could have inferred from all the evidence that the real danger facing Rogers as he approached the hole was the imminent and hidden risk of the ground collapsing under his feet, not falling into the existing hole. U.S. Silica argues that the cautious manner in which Rogers approached the hole (stepping on the railroad ties), as well as his prior experience with washouts, indicate that he fully appreciated this danger. However, the evidence also suggests that Rogers was unaware of the attendant facts constituting the dangerous condition. As the Court recalls, Rogers testified that he had no knowledge concerning the depth of the hole, the presence of water at the bottom, nor how far the erosion extended underneath the track. From all these factors the jury could have inferred that Rogers did not fully appreciate the danger he faced. Therefore, the Court could not conclude as a matter of law that U.S. Silica had no duty to warn Rogers, and the question of whether the hole was an open and obvious danger to which Rogers voluntarily exposed himself was properly submitted to the jury.

For the aforementioned reasons, U.S. Silica's JNOV motion is hereby DENIED.

B. NORFOLK SOUTHERN'S JNOV MOTION

Next, Norfolk Southern also moves for judgment notwithstanding the verdict. Cognizant that Plaintiff's con-

tributory negligence is not a complete defense under FELA, Norfolk Southern initially argues that the only reasonable inference from all the evidence is that Plaintiff's injuries were caused *solely* by his own negligence. As in the case of U.S. Silica's JNOV motion, the Court finds that this determination was a factual matter properly submitted to the jury. For the sake of demonstrating the difficulty with this argument, the Court will point out that even if the jury had found the Plaintiff 99% comparatively negligent, and Norfolk Southern 1%, then Norfolk Southern would still be liable for Plaintiff's damages. 45 U.S.C. §§ 51 and 53. In *Johannessen v. Gulf Trading & Transport Co.*, 633 F.2d 653 (2nd Cir. 1980), the court noted that "it is well established that the role of the jury is significantly greater in FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed." Given the tenuous degree of fault necessary to establish liability under FELA and the jury's substantial deference in so determining, this Court will not grant Norfolk Southern's JNOV motion based on the argument that Plaintiff's sole negligence caused his injuries.

In the alternative, Norfolk Southern argues that the only reasonable inference to be drawn from all the evidence is that it committed no negligence which proximately caused Plaintiff's injuries. Norfolk Southern contends that it had no knowledge, actual or constructive, that U.S. Silica installed slurry pipes underneath the spur tracks, and that absent such notice it has no duty to ensure they are encased. *See Gallose v. Long Island R.R. Co.*, 878 F.2d 80 (2nd Cir. 1989) ("[a]n employer breaches its duty to provide a safe workplace *only* when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and protect its employees.").

However, this Court finds ample evidence in the record that suggests Norfolk Southern at least had constructive notice of the slurry pipes underneath the spur tracks at

the U.S. Silica plant. Constructive notice is defined as, "knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the *duty of inquiring into it.*" (emphasis added). The evidence suggests that Norfolk Southern was familiar with the AREA regulations as well as its own guidelines requiring pipes running underneath tracks to be encased. Further, it was surely aware of the nature of U.S. Silica's slurry operations at the West Columbia plant, because Norfolk Southern track supervisors had been called to that facility on prior occasions to inspect the tracks. These facts alone provide a sufficient basis to infer that Norfolk Southern had constructive notice of the presence of slurry pipes underneath the spur tracks at the U.S. Silica plant. Therefore, the jury could infer that Norfolk Southern breached its duty of ordinary care by failing to inquire about the encasement of these pipes. For this reason, the Court finds that the question of Norfolk Southern's negligence in this regard was properly submitted to the jury, and its subsequent findings are consistent with the weight of the evidence.

For the all the aforementioned reasons, Norfolk Southern's motion for JNOV is hereby DENIED.

II. U.S. SILICA'S AND NORFOLK SOUTHERN'S MOTION FOR NEW TRIAL ABSOLUTE BASED ON THE EXCESSIVENESS OF THE VERDICT

Next, U.S. Silica and Norfolk Southern pray for a new trial absolute based on the contention that the jury's determination of damages was grossly excessive under the evidence. Although, the Court has broad discretion in granting a new trial based on the excessiveness of the verdict, it *must* grant the motion if the verdict is so grossly excessive as to "shock the conscience," and clearly indicates that the figure reached was the result of passion, caprice, or prejudice. *Vinson v. Hartley, infra.* A

failure to do so amounts to an abuse of discretion. *Id.* Yet at the same time, the jury's determination of damages is entitled to substantial deference. *McCourt v. Abernathy*, ____S.C.____, 457 S.E.2d 603 (1995).

Although the verdict in this case is quite substantial, the Court finds that it does not "shock the conscience," so the verdict does not necessarily mandate a new trial absolute. Likewise, after balancing this Court's duty to scrutinize the verdict with the jury's traditional role of allocating damages, it is clear the verdict should stand. Under our law, a Plaintiff may recover pecuniary damages for intangibles such as pain and suffering. *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964). During the trial of this case, Rogers sought recovery for the following damages: the present value of lost wages, both past and future; the present value of lost fringe benefits, past and future; physical and mental pain and suffering, past and future; medical expenses; and the loss of enjoyment of life resulting from his injuries. The Court's notes of the trial reflect that the Plaintiff's economic expert, Professor Thompson, testified that the present value of Rogers' loss of wages as an Assistant Track Supervisor is $702,472.00. Further, Thompson testified that the present value of Rogers' lost fringe benefits is $347,311. Rogers's medical bills exceeded $30,000.00. Assuming the jury used these figures exclusively in calculating its verdict, Rogers' economic loss totals approximately $1,080,000.00. Therefore, the jury must have calculated Rogers' pain and suffering damages to be roughly $1,990,000.00.

Damages for intangible losses and emotions of course cannot be determined by any fixed measure. *Knoke v. South Carolina Dept. of Parks, Recreation, and Tourism*, ____S.C.____, ____S.E.2d____ (Opinion No. 24514, Filed November 4, 1996). In *Knoke* the Supreme Court upheld the trial court's denial of a motion for a new trial absolute where the jury returned a verdict for $3,000,000.00 and the Plaintiff failed to prove any economic loss. Unlike the Plaintiff in *Knoke*, Rogers presented considerable evi-

dence of his economic loss. Although *Knoke* involved the wrongful death of a child, the case stands for the larger principle that designating a monetary value for intangible damages is a task best left to the jury. *Id.*

Although Rogers was not left paralyzed or disfigured, he has nevertheless suffered greatly from the aggravating injury of 1993. He testified at great length about how he no longer enjoys activities he once participated in like golf, skiing, bowling, and basketball. He testified about constant pain in his lower back, and his inability to sleep. More compellingly, he spoke of his frustrations at not being able to hold his young daughter, as well as the strain his injury has placed on his marriage. The Court finds abundant evidence to support a substantial award of damages. Therefore, the Court cannot in good conscience conclude that the jury's determination of pain and suffering damages was motivated by passion, caprice, or prejudice.

Next, Defendant Norfolk Southern's observations regarding the jury's demeanor toward the Plaintiff, as well as the Clerk of Court's reactions to the reading of the verdict, are well noted. However, this Court cannot conclusively state that such reactions in and of themselves reflect the presence of prejudice, passion, or caprice on the part of the jury. Norfolk Southern cannot point to anything in the record that suggests otherwise. Also, Norfolk Southern attaches some significance to the fact that during the settlement negotiations, facilitated and encouraged by this Court, Rogers expressed some willingness to settle the case for $400,000. Norfolk Southern reasons that the verdict of $3,000,000 is so far beyond the Plaintiff's own expectations for a reasonable recovery that this Court must conclude that it "shocks the conscience." However, this Court is unwilling to draw such a conclusion. The settlement negotiations between the parties are totally irrelevant to the trial of the case on the merits and the jury's subsequent determination of damages. Finally, Norfolk Southern contends that the brevity of the jury's

deliberations (approximately 50 minutes) is evidence of prejudice, passion, and caprice. The Court cannot impute any prejudice, passion, or caprice to the length of the jury's deliberations. The Court will note that the jury remained attentive and conscientious throughout the trial. The Court is quite satisfied that the jury carefully and diligently considered the issues presented.

For these reasons, the Defendants' motions for new trial absolute based on the excessiveness of the verdict is DENIED.

III. DEFENDANT NORFOLK SOUTHERN'S MOTION FOR A NEW TRIAL *NISI REMITTITUR*

In the alternative to its motions for JNOV and new trial absolute, Norfolk Southern moves for a new trial *nisi remittitur*. Under this device, the trial judge may grant a new trial based on a determination that the verdict is unduly liberal, unless the Plaintiff agrees to a reduction of the verdict. *Jones v. Ingles Supermarket, Inc.*, 293 S.C. 490, 361 S.E.2d 775 (Ct. App. 1987). While this procedure does not allow the trial judge to unilaterally substitute his judgment for that of the jury, it gives the Plaintiff the option of either electing the remittitur suggested by the trial judge, or the granting of a new trial on the merits. *Id.* As the Court in *Vinson* pointed out, compelling reasons must be given to justify the granting of a new trial *nisi remittitur*. *infra*. Due to the trial judges familiarity with the evidentiary atmosphere, appellate courts extend great deference to a judge's decision not to remit a verdict, especially in the area of intangible elements of damages. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

After carefully considering the issue, the Court cannot fathom any compelling reasons to grant Norfolk Southern's motion. It cannot in good conscience disturb the jury's findings of damages for many of the same reasons stated earlier. Albeit quite a large verdict, the Court does not believe that it is unduly liberal to the extent that war-

rants a new trial *nisi remittitur*. Norfolk Southern proposes that the verdict be remitted to $500,000. Such a substantial remittitur, a 500% reduction, is clearly tantamount to simply saying the verdict shocks the conscience. In other words, if the Court were inclined to remit the verdict that much, then it certainly would be obligated to simply grant a new trial absolute. Because this Court is extremely reluctant to usurp the province of the jury in awarding damages, Norfolk Southern's motion for an new trial *nisi remittitur* is DENIED.

IV. NORFOLK SOUTHERN'S MOTION FOR A NEW TRIAL BASED ON COURT'S FAILURE TO CHARGE ITS REQUESTS

Finally, Norfolk Southern moves for a new trial, alleging the Court erred in not charging its Requests to Charge numbers 5, 11, 14, 16, 18, 20, 22, 26, and 32. To warrant a new trial based on the failure or refusal to give a requested jury instruction, the moving party must show that such refusal or failure was not only erroneous, but prejudicial as well. *Sherer v. James*, 286 S.C. 304, 334 S.E.2d 283 (Ct. App. 1985), rev'd on other grounds, 290 S.C. 404, 351 S.E.2d 148 (1986). Further, failure to give a properly requested charge is not error if the Court's general instructions are sufficiently broad to enable the jury to understand the law and the issues involved. *Waldrup v. Metropolitan Life Ins. Co.*, 274 S.C. 344, 263 S.E.2d 652 (1980).

First, other than a general allegation of prejudice, Norfolk Southern does not specifically show how the failure to charge each of its requests resulted in prejudice; therefore, the Court will not grant a new trial on this ground.

Nevertheless, in all fairness to Norfolk Southern, the Court has reviewed *sua sponte* the requests at issue and must conclude that its general instructions to the jury substantially addressed the issues raised in the disputed requests to charge. First, requests to charge #5, #16, #18, and #32 basically reiterate that a railroad is not an

insurer of an employee's safety, and as such, it must only protect its employees from dangers of which it knows or should know. This point was adequately covered by the Court's general instructions on the standard of care applicable to Norfolk Southern. Second, #11 deals with income taxes on damage awards, which the Court found to be wholly inappropriate and irrelevant. Third, #14 essentially states that FELA *presumes* that a railroad is unaware of defects or dangers on the land of another. The Court believes that such an absolute proposition must have been taken out of the context of its cited authority. Because of its questionable validity, it was properly not charged. Fourth, Requests to Charge #20 and #22 were covered by the Court's general instructions on damages. Last, #25 is a charge on "accident." The Court finds no prejudice in the failure to charge this request because the legal concept of accident is inherent in the Court's charge on foreseeability and causation. Further, the evidence presented simply did not support an independent charge on accident. *See McBeth v. TNS Mills, Inc.*, ____S.C.____, 458 S.E.2d 52 (Ct.App. 1995) (court must only charge the jury on the applicable law as raised by the pleadings and supported by the evidence).

For these reasons, Norfolk Southern's motion for a new trial based on the failure to charge the aforementioned requests is hereby DENIED.

V. U.S. SILICA'S MOTION FOR NEW TRIAL BASED ON REMAINING ALLEGATIONS OF ERROR

Defendant U.S. Silica, as noted earlier, alleges 30 errors of law committed by this Court in furtherance of its demand for a new trial absolute. U.S. Silica's exceptions #1 through #8 regarding the sufficiency of the evidence have already been addressed in consideration of its motion for Judgment Notwithstanding the Verdict. The remaining allegations of error support U.S. Silica's motion for a new trial absolute. Under the harmless error standard con-

tained in South Carolina Rules of Civil Procedure Rule 61, this Court cannot grant a new trial absolute based on errors in the admission or exclusion of evidence or defect in any ruling unless a refusal to take such action appears to be "inconsistent with substantial justice." Applying this standard, the Court concludes that the alleged errors, even if true, do not warrant a new trial at this juncture. U.S. Silica has failed to show how these alleged errors have immediately affected their substantial rights. Nevertheless, the Court will take the opportunity to address each of U.S. Silica's exceptions.

A. EXCEPTION #9

In exception #9 U.S. Silica alleges the Court erred in not severing Rogers's negligence cause of action against Norfolk Southern under the Federal Employees Liability Act (FELA) and his premises liability claim against U.S. Silica. This issue was thoroughly argued before the trial commenced. At that time counsel for U.S. Silica argued that failing to sever the claims would prejudice U.S. Silica because of the different standards of proof and elements of causation necessary to establish a claim under FELA and those of common law negligence in a premises liability case.

The issue of whether or not a FELA claim and a common law claim may be properly tried together was addressed in *Earwood v. Norfolk Southern Railway Company*, 845 F. Supp. 880 (N.D. Ga. 1993). In *Earwood* the District Court held that a FELA action and a negligence action could be tried together. The Court expressed its confidence that it could adequately instruct the jury on the nuances between the two causes of action, as well as the jury's ability to comprehend and consider the issues. Likewise in the instant case, this Court believes that the jury in this case was very capable of understanding the issues presented. Further, the Court is confident that its instructions to the jury were clear and correct statements of the applicable law. As noted earlier, the Court went to great lengths to ensure this.

In addition, severing the claims would have frustrated the interests of judicial economy. Requiring separate trials on claims arising from the same set of operative facts would be unnecessarily duplicative and a waste of judicial resources. Finally and most importantly, severing the FELA claim from the common law claim would have had a greater likelihood of resulting in prejudice to the Plaintiff than either of the Defendants. As the court in *Earwood* explained, if the claims had been severed, and separate trials conducted, then the absent potential tortfeasors in the respective trials could be found primarily liable, thus allowing the plaintiff to recover nothing. For these reasons the Court finds that it properly exercised its discretion under SCRCP Rule 42 not to sever the claims; therefore, a new trial on this exception is denied.

B. EXCEPTION #10

Exception #10 relates to the very crux of this case. Therefore, a little background is in order here. First, it is undisputed from all the evidence presented in this case that the wash-out which led to Rogers injury was caused by high velocity water erosion from a ruptured slurry pipe running underneath U.S. Silica's tracks. Further, it is virtually undisputed that slurry pipes running underneath railroad tracks should be encased by an outer pipe to prevent such erosion in the event of a rupture. Therefore, a basic issue in this case becomes: Who is responsible for encasing the slurry pipes?

Exception #10 contends that evidence of any alleged negligence committed by U.S. Silica regarding the failure to encase the slurry pipes was irrelevant because the danger surrounding the wash-out was open and obvious. For the same reason, U.S. Silica also objected to evidence of its alleged negligence in repairing a similar washout underneath the tracks in question on the Saturday before Rogers' injury. However, these contentions necessarily fail if the dangerous condition was not open and obvious, which, as discussed *infra*, was an issue properly submitted to the jury.

Further, as discussed earlier with regard to U.S. Silica's JNOV motion, it is elementary that a landowner may be held liable for dangers on his premises of which he either has knowledge, has created through his operations, or could discover through the exercise of reasonable care. *H.L. Green Co. v. Bowen*, 223 F.2d 523 (4th Cir. 1955); *Mullen v. Winn-Dixie Stores, Inc.*, 252 F.2d 232 (4th Cir. 1958). Because U.S. Silica clearly owes invitees a duty to maintain its premises in a reasonably safe condition, *Pennington v. Zayre Corp., infra*, evidence of a breach of this duty is undoubtedly admissible. Surely, U.S. Silica does not contend otherwise.

Rather based in part on U.S. Silica's previous arguments, it appears to this Court that the real theory behind exception #10 is that U.S. Silica's duty to Rogers as an invitee is somehow extinguished, superseded, or encompassed, by Norfolk Southern's nondelegable duty under FELA to provide its employees with a safe place to work. From this premise U.S. Silica reasons that the *only* duty it owed Rogers, *if any*, was to simply *warn* Rogers of the washout. They argue that its alleged negligence in failing to encase, or adequately repair the slurry pipes is therefore irrelevant, and highly prejudicial to the issue of whether U.S. Silica breached its sole duty to warn. In its proposed order, U.S. Silica cites *Payne v. B&O Railroad Co*, 300 F.2d 546 (6th Cir. 1962), for the broad proposition that a railroad cannot escape liability when its employee is injured from an unsafe condition on premises it does not own, control, or maintain, and the existence of such condition is caused solely by the negligence of a third-party. In other words, U.S. Silica essentially argues that Norfolk Southern's nondelegable duty makes it vicariously, and therefore strictly liable, for any negligence committed by U.S. Silica.

However, such an application of the nondelegable duty rule is clearly erroneous, because it would render FELA a pure, no-fault system akin to worker's compensation laws, which is clearly contrary to the intent of the Supreme

Court and Congress. *See Fashauer v. Nw Jersey transit Rail Corp.*, 57 F.3d 1269 (3rd Cir. 1995) ("FELA is neither a worker's compensation statute nor a strict liability statute, and absent explicit direction from Congress or the Supreme Court, we decline to turn it into one."). Moreover, this reasoning perverts the common law duty of a premises owner to an invitee by making its application entirely contingent upon the invitee's employer. In other words, a landowner frequented mostly by invitees subject to FELA would be exempt from liability, and essentially free to maintain his premises in a dangerous condition under U.S. Silica's interpretation. This clearly thwarts the sound policy of encouraging landowners to maintain their premises in a reasonably safe condition for all invitees.

Rather, an appropriate application of the nondelegable duty rule provides that the sole negligence of a third-party premises owner *may* be imputed to the railroad, but not *necessarily* so, as U.S. Silica argues. *See Dulasky v. Consolidated Rail Corporation*, 1990 WL 134848 (N.D.N.Y.). Instances where a railroad may be held liable for the negligence of a third-party include the scenario where the third-party is an agent of the railroad, *See Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958), or where the third-party is bound by a contract with the railroad, *See Carney v. Pittsburgh & Lake Erie R.R. Co.*, 316 F.2d 277 (3rd Cir.), cert. denied, 375 U.S. 814 (1963). Because the relationship between U.S. Silica and Norfolk Southern at the time in question does not warrant strictly imputing any negligence of U.S. Silica to Norfolk Southern, the Court can discern no further basis for exception #10. Therefore, all evidence probative of U.S. Silica's negligence in causing and/or failing to adequately repair the washout in breach of its duty to Rogers as an invitee was properly admitted.

C. EXCEPTIONS #11-#14

In Exceptions #11-#14 U.S. Silica alleges that the Court erred in allowing Plaintiff's expert, Ronald Dunn, to tes-

tify about American Railway Engineers Association ("AREA") guidelines and regulations regarding the encasing of pipes running underneath railroad tracks. U.S. Silica contends that the Court should have included a limiting instruction to the effect that such evidence must be considered only in regard to the FELA claim against Norfolk Southern. The Court does not have the benefit of a complete record of this case, but as it recalls from its notes, U.S. Silica never requested such a limiting instruction. Therefore, if a limiting instruction was not requested, then the Court considers this exception not preserved for consideration in U.S. Silica's motion for a new trial.

Assuming that U.S. Silica did request such an instruction, the Court concedes that it probably should have granted the request. However, the Court finds that failing to do so caused no prejudice to U.S. Silica. The AREA regulations in conjunction with the records dealing with the unsigned side-track agreement were admitted for the purpose of showing that Norfolk Southern took reasonable action to comply with its nondelegable duty to provide Rogers with a safe place to work. Such evidence was not necessarily admitted for the purpose of pointing liability for the wash-out toward U.S. Silica. The Court cannot see how a failure to include a limiting instruction on the admission of the AREA regulations prejudices U.S. Silica, especially in light of Ronald Dunn's own testimony on cross examination that such regulations had no application to U.S. Silica.

D. EXCEPTIONS #15-#19

Exceptions #15 alleges error in not allowing Dr. Ralph Owings to testify that Norfolk Southern's Director of Medical Services committed malpractice by returning Rogers to work in his same capacity after Plaintiff's 1989 back injury. The Court properly excluded such testimony because it obviously calls for a legal conclusion which Doctor Owings was not qualified to make. Similarly, testimony from Dr. Owings to the effect that returning Rogers

to work after 1989 was at least "bad judgment," was properly not allowed because it involves an opinion on an issue which does not require an expert. The jury was quite capable of drawing such a conclusion from Dr. Owings' testimony.

Next, exceptions #16-#19 essentially allege error in not admitting Plaintiff's actual claim against Norfolk Southern (U.S. Silica's exhibit 5 for identification), for his prior back injury as evidence of Norfolk Southern's negligence in returning Rogers to work in his same capacity, and Rogers' own contributory negligence in returning to work. The Court found that the risk of prejudice from the admission of exhibit 5 for identification far outweighed any probative value. However, as the Court recalls, it provided ample opportunity for U.S. Silica to pursue its theory without admitting exhibit 5. For example, during U.S. Silica's cross-examination of Rogers, the Court allowed counsel to elicit that Rogers settled claims against Norfolk Southern for prior back injuries suffered in 1985 and 1989. Further, the Court granted U.S. Silica considerable leave to inquire about the extent of Rogers' prior back injuries on its cross-examination of Dr. Owings. Rogers himself admitted he made a claim against Norfolk Southern for his prior injury, so it was not necessary or proper to smuggle the contents of exhibit 5 for identification into evidence. Similarly, it was not proper to do so under the guise of refreshed recollection. Such tactics can only be viewed as an attempt to inflame the jury. Therefore, U.S. Silica's Exhibit 5 for identification was properly excluded pursuant to Rule 403.

E. EXCEPTIONS #20

In Exception #20 U.S. Silica alleges that the Court erred in failing to exclude the testimony of its former plant manager, George Foster, whose testimony was procured by counsel for Plaintiff and Norfolk Southern contrary to the ethical rules governing contact with former employees of an adverse corporate party. The Court has read S.C. Bar Ethics Advisory Opinion 94-25 and con-

cludes that it only prohibits contact with former employees of an adverse corporate party when the employees actions can be imputed to the corporation, or when the employee's actions are the subject of the representation. In the present case, George Foster was not an officer or a member of the board of directors of U.S. Silica, so his actions are not strictly imputable to U.S. Silica. George Foster only testified that *he* was aware of the AREA regulation requiring slurry pipes to be encased. Moreover, George Foster's acts or omissions as plant manager are not the subject of this lawsuit. No one has alleged that he was responsible for ensuring that the slurry pipes underneath the spur tracks were encased.

Irrespective of these considerations, however, the Court finds that the exclusion of relevant evidence absent a clear or egregious violation of ethics rules in obtaining such evidence is not a proper remedy. It is not this Court's province to determine whether or not counsel for Plaintiff and Norfolk Southern violated ethical rules. The court suggests that counsel for U.S. Silica address this matter to the Bar Ethics Committee if he is sufficiently outraged by his opposing counsels' conduct.

F. EXCEPTION # 21

In exception #21 U.S. Silica further alleges error in the admission of Norfolk Southern's exhibits 1-9 on the grounds that the grounds that they constitute hearsay correspondence between U.S. Silica's and Norfolk Southern's predecessors from 1969 to 1980. These letters discussed negotiations on a "side track agreement" between the two preceding entities. After concluding that these documents were relevant for the purpose of showing that Norfolk Southern took reasonable care to comply with its duty to provide a safe work place and not unduly prejudicial to either the Plaintiff or U.S. Silica, the Court admitted them into evidence under the business record exception to the hearsay rule. S.C. R. Evid. 803(6). Although U.S. Silica's proposed order does not elaborate on its objection to this evidence on hearsay grounds, the only con-

ceivable hearsay objection this Court can discern is that some of the records admitted during Norfolk Southern's case were not actually prepared by Norfolk Southern in the ordinary course of its business. Some of the letters in Norfolk Southern's files were prepared by U.S. Silica's predecessor. However, these records were admitted because the series of correspondence from U.S. Silica's predecessor was necessary to Norfolk Southern and its predecessor in making business decisions on the side track agreement. *Cf. Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) (bank required a copy of purchase order for equipment in making its decision to grant a loan). Thus, exception 21 does not necessitate the granting of a new trial.

G. EXCEPTIONS #22-#26

The errors alleged in exceptions #22-#26 present the most troubling aspects of the procedural posture of this trial. Therefore, these points deserve more careful consideration. Generally, exceptions #22-#26 address the manner in which this case was submitted to the jury. Specifically, exceptions #22 and #23 reargue the point made earlier about the danger of confusion regarding the Court's charge to the jury.

The formulation of jury instructions is within the sound discretion of the court, and a verdict will not be disturbed based on such formulation as long as the instructions as a whole are fair and accurate statements of the law. *Voelker v. Frederick Business Properties Co.*, 465 S.E.2d 246, 195 W.Va. 246 (1995). As mentioned earlier, the Court made a meticulous effort to ensure that the jury understood the different standards of proof and causation by either charging the law applicable to each defendant separately, or when charging a specific point of law applicable to only one defendant, including a disclaimer stating that particular point was not to be considered in regard to the other defendant.

Also, the verdict form itself reflects the lesser showing for causation necessary under FELA by reading, "Do you find that DEFENDANT, NORFOLK SOUTHERN'S, negligence was *a cause* of Plaintiff's injuries?" (emphasis added). On the other hand, the question of causation with regard to U.S. Silica specifies "proximate cause." The Court cannot conceive of any better method of stressing the differences in causation applicable to each defendant. The jury never requested clarification on any points of law, so the Court must conclude that its instructions were clear.

Next, exception #24 contends that the Court erred by submitting Plaintiff's FELA claim against Norfolk Southern and his common law premises liability claim against U.S. Silica to the jury as one cause of action. U.S. Silica contends that each claim represents two distinct causes of action even though they arose out of the same incident, were plead together in the same complaint, and allegedly concurred to cause one injury. Initially, the term "cause of action" is not amenable to a precise or inclusive definition. *See generally* 1A C.J.S. Actions Section 21(a) 1985. Traditionally, a cause of action has been defined in South Carolina as a right of the Plaintiff, a corresponding duty of the Defendant, coupled with a wrong by the Defendant in breach of such right and duty. *See Landvest Associates v. Owens*, 276 S.C. 22 at 24, 274 S.E.2d 433 at 434 (1981); *Harth v. United Insurance Co.*, 266 S.C. 1 at 5, 221 S.E.2d 102 at 104 (1975).

Applying these principles to the present case, the Court is not convinced that Rogers' action pursuant to FELA is substantially distinguishable from his premises liability claim in fact[1] or in law. It is clear that the primary right Rogers seeks to enforce in both actions is the recovery of damages. *See e.g. Glenn v. E.I. DuPont de Nemours & Co.*, 250 S.C. 323, S.E.2d. (1965). Next, each defendant

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[1] Regarding the facts, it is undisputed that both claims arose out of the same incident.

owed Rogers essentially the same duty (ie. U.S. Silica's duty to maintain its premises in a reasonably safe condition and Norfolk Southern's duty to provide its employees with a safe place to work).[2] *See e.g. Id.* Finally, the Plaintiff alleged that each defendant's breach of duty, or wrongs, concurred to cause a single injury. *See e.g. Id.*

Furthermore, the applicable law in this case is consistent with one negligence cause of action. Other than the federal common law interests embodied in the lesser showing of causation necessary to establish liability under FELA, the claims essentially sound in negligence.[3] Both actions still share the elements of common law negligence: 1) existence of a duty, 2) breach of duty, 3) causation, and 4) damages. Further, the Court concludes that the burden of proof regarding causation is not a substantive distinction, but rather a procedural one. The distinction merely refers to the *quantum* of proof a Plaintiff must present to sustain his burden. *See Dulasky, infra* at 5.

As the Court stated in *Glenn*, "[l]ogically, every wrong furnishes itself a cause of action, but different wrongs may be so blended as to be called a single wrong, as to furnish but one cause of action . . ." *Id.* quoting *Floyd v. C.I.T. Corp.*, 191 S.C. 518, 5 S.E.2d 299. This Court finds that Rogers' action pursuant to FELA and the premises

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[2] U.S. Silica undoubtedly disputes this contention, arguing that the duties owed by itself and Norfolk Southern are distinct, and therefore provide separate grounds for liability. Ordinarily this contention may be correct, but in this case Roger's workplace in the scope of his employment with Norfolk Southern just happened to also be U.S. Silica's premises.

[3] "Under FELA the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the *slightest*, in producing the injury . . ." *Dulasky v. Consolidated Rail Corp.*, 1990 WL 134848 (N.D.N.Y. 1990), quoting 352 U.S. at 506, (emphasis added). The court in *Dulasky* notes that the adjective "slightest" only applies to the element of causation. The quantum of proof necessary for the other elements of negligence – duty, breach, and foreseeability – remain unchanged by this language.

liability action involve blended, inseparable questions of law and fact. While each cause of action may technically provide a separate basis for liability, they are not distinguishable to the extent that prejudice to any party and/or confusion on the part of the jury *necessarily* resulted from submitting the case as one cause of action on a single verdict form. Indeed, the Court believes that this case essentially presents the classic case in which a Plaintiff alleges that the negligence of two tortfeasors concurred to cause his injury. Moreover, the Court finds that its charge to the jury adequately preserved all federal rights and burdens secured by FELA, and limited their application solely to Norfolk Southern.[4]

Next, in exceptions #25 and #26 U.S. Silica alleges that the Court erred in submitting a forms of verdict that required the jury to compare the relative fault between all the parties in contradiction of *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), and S.C. Code Ann. § 15-38-10, *et seq.* – The Contribution Among Joint Tortfeasors Act. Initially, U.S. Silica is correct in its assertion that *Nelson* and its progeny do not specifically provide for a comparison of fault between all the parties in an action. Rather, *Nelson* states, "[i]f there is more than one defendant, the plaintiff's negligence shall be compared to the *combined negligence* of all defendants." (emphasis added) *Nelson* at 245, 399 S.E.2d at 784.

However, the Supreme Court implicitly approved of a forms of verdict that allowed the jury to compare fault between the all parties in *Southeastern Freight Lines v. City of Hartsville*, ____S.C.____, 443 S.E.2d 395 (1994). In that case, the defendant in a wrongful death action settled

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[4] Additionally, the Court will note that it submitted this case to the jury as one cause of action, in part, to avoid possible prejudice to the defendants. For example, if the Court had presented a separate verdict form for each claim, then the jury might believe that it could find for either Norfolk Southern or U.S. Silica, but not both. Alternatively, the jury could also believe that it may return a verdict against one defendant or the other, but not both.

Plaintiff's claim against it for $400,000, and subsequently brought a contribution action against the city and the state on the grounds that failure to place proper warning signs at the fatal intersection was a contributing proximate cause of death. Judge Anderson submitted a form of verdict in which the jury apportioned liability as follows: Claimant-70%, City-20%, and State-10%. The Court then amended the verdict to conform with the Contribution Act.

Although *City of Hartsville* was a contribution action brought to determine fault between the *tortfeasors only*, the practice of allowing the jury to apportion fault between a plaintiff and multiple defendants is analogous.[5] At the trial level, the sole issue in *City of Hartsville* was whether or not the city's and/or the state's negligence, if any, was a proximate cause of the Plaintiff's death. If so, then according to the doctrine of joint and several liability and § 15-38-20(B) of the Contribution Among Joint Tortfeasors Act, each tortfeasor is liable for their pro rata share of the damages. Further, § 15-38-30 states, "In determining pro rata share of the tortfeasors in the entire liability (1) *their relative degrees of fault shall not be considered" et seq.* (emphasis added). Reading these sections together yields the inescapable conclusion that "pro rata share" must actually mean *per capita* share. Therefore, in *City of Hartsville* the percentages of negligence among the tortfeasors allocated by the jury was irrelevant to a determination of *per capita* share and did not yield a legal result contrary to § 15-38-20(B). Judge Anderson could have just asked the jury with regard to each alleged tortfeasor, "Was the negligence of the governmental entity the proximate cause of Plaintiff's death?" However, Judge Anderson evidently believed that from a layper-

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[5] The issue on appeal in *City of Hartsville* dealt with conflicting provisions between the Contribution Among Joint Tortfeasors Act and the Torts Claims Act, and not the manner in which the trial judge submitted the issue to the jury.

son's perspective he chose the simplest method of submitting the issue to the jury.

Likewise, this Court finds that given the Plaintiff's allegation in the instant case that Norfolk Southern's and U.S. Silica's negligence concurred to cause his injuries, it properly allowed the jury to allocate fault between all the parties. The Court can discern no prejudice to U.S. Silica from this procedure. The interrogatories in the verdict form required the jury to make a finding on Plaintiff's contributory negligence in accordance with *Nelson*. The jury attributed 0% negligence to Rogers. Presumably this determination would have been the same even if the question of Rogers' contributory negligence had been presented separately with regard to each defendant.

Furthermore, requiring the jury to make a finding on Plaintiff's contributory negligence still effectively eliminated the danger of a verdict against U.S. Silica based on an erroneous application of 45 U.S.C. §§ 51 and 53. Section 51 of the FELA abolishes the absolute defense of contributory negligence, while § 53 imposes full liability upon a railroad for its employees injuries due "*in whole or in part*" to its negligence. (emphasis added). The forms of verdict explicitly stated that it was proper to allocate 0% negligence to any party. Because the jury allocated 70% of the negligence in the case to U.S. Silica, it clearly did not apply FELA's "slight negligence" standard in its verdict against U.S. Silica.

Finally, nothing in FELA prevents a railroad from sharing liability for injuries caused by its negligence and the concurring negligence of a third-party. Thus, in accordance with the doctrine of joint and several liability that still prevails in South Carolina, the verdict in this case only means that U.S. Silica and Norfolk Southern are each liable for their unlimited pro rata share of the $3 million. *The verdict does not mean that U.S. Silica is responsible for 70% of the verdict, while Norfolk Southern must only pay 30%.* Such allocations of negligence are merely advisory in nature and do not alter the application

of the Joint Tortfeasor Act. Once judgment has been entered, Rogers may collect from either U.S. Silica or Norfolk Southern, or both. In the event that Rogers collects his entire damages from one of the defendants, the Court may entertain a motion for contribution pursuant to § 15-38-40(B).

H. EXCEPTIONS #28-#29

Finally, in exceptions #28 and #29 U.S. Silica alleges that the Court erred by not charging the law of assumption of the risk as a complete defense to Rogers' allegations of negligence against U.S. Silica. In the alternative U.S. Silica argues that if not a complete defense, the Court should have at least charged assumption of the risk regarding the existence or nonexistence of its duty to warn Rogers of an open and obvious danger. At the trial, the Court struck both Defendant's assumption of the risk defenses, and ruled that assumption of the risk no longer exists *per se* in the wake of *Nelson*. The Court ruled that assumption of the risk was not a total bar to Plaintiff's recovery, and that the larger penumbra of comparative negligence encompasses assumption of the risk. *See* F. Patrick Hubbard and Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 S.C. L. Rev. 273 at 289. The Court further advised counsel for Norfolk Southern and U.S. Silica that they could essentially argue assumption of the risk without invoking it by name in regard to their theory that the Plaintiff voluntarily exposed himself to an open and obvious danger. Moreover, the Court included instructions to the effect that a Plaintiff may be contributorily negligent if he voluntarily exposes himself to an obvious danger. For these reasons, the Court finds no merit in U.S. Silica's exceptions #28 and #29.[6]

---

[6] Although not determinative here, it is interesting to note that in *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, Opinion No. 2621 (Davis advance Sheets #2) the Court of Appeals *en*

CONCLUSION

For all of the aforementioned reasons, U.S. Silica's and Norfolk Southern's post-trial motions are hereby DENIED. Therefore, judgement in this case shall be entered for the Plaintiff, John David Rogers, in the amount of three million dollars ($3,000,000).

IT IS SO ORDERED!

/s/ PAUL E. SHORT, JR.
Paul E. Short, Jr.
Presiding Judge

13th day of May 1997

---

banc held that assumption of the risk is no longer a complete defense, and that it is merely one facet of comparative negligence.

APPENDIX D

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

FORMS OF VERDICT

All answers must be unanimous. All jurors must agree before an answer is entered.

1. Was the Defendant, Norfolk Southern, negligent?

   YES__√__ NO_____

   If your answer is "no,' proceed to Question 3.

   If your answer is "yes" go to Question 2.

2. Was the Defendant's, Norfolk Southern's, negligence a cause of the Plaintiff's injuries?

   YES__√__ NO_____

   If your answer is "no,' proceed to Question 3.

   If your answer is "yes" go to Question 3.

3. Was the Defendant, U.S. Silica Company, negligent?

YES__√__ NO_____

If your answer is "no," proceed to Question 5.

If your answer is "yes," go to Question 4.

4. Was the Defendant's, U.S. Silica Company's, negligence a proximate cause the Plaintiff's injuries?

YES__√__ NO_____

If your answer is "no," proceed to Question 5.

If your answer is "yes," go to Question 5.

5. Was the Plaintiff, John D. Roger's, negligent?

YES_____ NO__√__.

If your answer is "no," proceed to Question 7.

If your answer is "yes," go to Question 6.

6. Was the Plaintiff's, John D. Roger's, negligence a proximate cause of his own injuries?

If your answer is "no," proceed to Question 7.

If your answer is "yes," go to Question 7.

7. The entire negligence of the parties in this case must be allocated between the Plaintiff and the Defendants. It is not required that each party be allocated a percentage of negligence. It is perfectly acceptable to attribute 0% negligence to any party. Therefore, what percentage of negligence, if any, was the Plaintiff's, and what percentage of negligence was each Defendant's?

Plaintiff, John D. Rogers	0 %
Defendant, Norfolk Southern	30 %
Defendant, Norfolk Southern	70 %

Total must equal 100%

Proceed to Question 8.

8. What is the full dollar amount of the damages sustained by the Plaintiff, John D. Rogers? [Write the amount in both words and numbers.]

   $ 3,000,000.00 [numbers]

   Three Million & no/100 ~~~~~~~~ [words]

December 6, 1996 /s/ Tracey B. Gantt
Forelady

After the verdict form is completed and signed by the Forelady, please report to the Court.

STATE OF SOUTH CAROLINA
COUNTY OF Fairfield

JUDGMENT IN A CIVIL CASE

JR# 21,226

IN THE COURT OF COMMON PLEAS

CASE NO. 94-CP-20-49

John D. Rogers

Norfolk Southern Railway Co and

U.S. Silica Company

PLAINTIFF(S)

DEFENDANT(S)

52a

CHECK ONE:

[X] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED (CHECK REASON): [ ]Rule 12(b), SCRCP; [ ]Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ]Other- _____

[ ] ACTION STRICKEN (CHECK REASON): [ ]Rule 40(j) SCRCP; [ ]Bankruptcy; [ ]Other-_____

IT IS ORDERED AND ADJUDGED: [ ]See attached order; [ ]Statement of Judgment by the Court:

See attached jury verdict

Dated at Winnsboro, South Carolina, this 6th day of December 19 96.

Dorcas C. Anderson
Clerk of Court

This Judgment was entered on the 9th day of December, 19 96, and a copy mailed first class this 9th day of December, 19 96 to attorneys of record or to parties (when appearing pro se) as follows:

Robert McKenzie	William Tucker	John C. McMaster	Ronald Boston
P.O. Box 58	505 N. 20th St Suite 1700	P.O. Box 7337	P.O. Box 1473
Columbia, S.C 29202	Birmingham, AL. 35203	Columbia, S.C 29202	Columbia, S.C 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Dorcas Anderson
CLERK OF COURT

SCRCT FORM 4
(Rev. 2/96)

BEST AVAILABLE COPY

APPENDIX E

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

TRANSCRIPT OF RECORD
(December 2-6, 1996)

Before: The Honorable Paul E. Short, Jr., Judge and a Jury

* * *

[Testimony of James Ellis Gentry, Tr. 154, R. 87]

* * *

[Tr. 156, R. 89]

* * *

Q. I am going to show you what has been marked, offered and admitted as Plaintiff's Exhibit 6. Do you recognize that?

A. Yes, sir.

Q. And what is that?

A. That's the back corner of the wet process building eight and nine pumps.

Q. Show the ladies and gentlemen where the eight and nine pumps are.

A. That's them right there, that's eight and nine.

Q. What do they do?

A. They pump coarse sand into the stack.

Q. And does the line go out from eight and nine pumps generally along under where that book is in the middle of the track?

A. It runs out that way, but where I don't know.

Q. Okay, when this eight and nine pump line that you talk about is that the Nypak plastic line?

[Tr. 157, R. 90]

A. Yes, sir.

Q. Have you ever seen that line yourself?

A. I've seen where it comes out of the ground on over as it comes up out of the ground, then I can see it.

Q. Over here?

A. Yes, it's exposed.

* * *

[Tr. 181, R. 114]

* * *

Q. And one thing to make clear, Mr. Gentry, the eight and nine that we are speaking of – would you step down here, please, sir – the eight and nine line out at U.S. Silica is a line that runs from the pumps and the line goes underground here –

A. Yes, sir.

Q. – and runs in a straight line out towards the cyclone they call it or a big sand pile out here where sand is stored?

A. Yes, it runs out in that direction. Right there's part of it.

[Tr. 182, R. 115]

Q. Okay, I was going to ask you that. It runs underground and then in the lower left hand portion of Exhibit Number 1 do you actually see the eight and nine line?

A. Yes, sir.

Q. And is it then visible all the way to the sand pile?

A. Yes, sir, right up to where you get to the top of it, a little bit is under and then it comes back out.

Q. Where sand is pouring out of it, but the line actually runs exposed out and up over and is that roughly a quarter of a mile?

A. Yes, sir.

Q. And that is all Nypak?

A. As far as I know.

Q. What has been referred to as plastic, is that correct?

A. Yes, sir.

Q. Is that a very, very heavy line?

A. Yes, sir.

Q. And the wearing out of the line and you may take your seat – when you talk about the sand and slurry I think it's clear going through the line it is a certain percentage of water and a certain percentage of sand –

A. Yes, sir.

Q. – and by the very nature of what the pipes do and what they perform over a period of time they wear out in that fashion developing holes?

A. Yes, sir.

* * *

[Testimony of James Willard Holmes, Tr. 188, R. 121]

* * *

[Tr. 197, R. 130]

* * *

Q. And when it runs under the railroad track if it is cased if the slurry pipe broke, the casing is there to protect the track and run the product out away from it, so

that it doesn't undermine the track or come up through the track, is that right?

[sidebar omitted]

* * *

[Tr. 198, R. 131]

* * *

A. The question, let me see if I understand the question, it is why do we have this encased, is that the question?

Q. I want to find out the effect of it. We will start with why.

A. The reason we had it encased is because this mine line is operated anywhere from, you know, roughly sixty hours a week. So it's a high use line and it is run frequently and there was also, you know, kind of a sharp turn the line had to make to go under the pump and then there was another sharp turn to come up to the raw sand tank. The reason we had it encased is because that particular line would tend to wear out pretty frequently and it's easier to replace that line if you had a casing and if you replaced it every three years or four years or whatever, then we can pull it out of the casing and then put it back in without digging up the railroad track and that line had a history of needing to be replaced every three to five years something like that I don't know exactly.

* * *

Q. But if the slurry pipe broke underneath the ground, the casing would prevent it from bubbling up through the track, right? So if it breaks right here if it has got

a bigger pipe around it as the product breaks it's going to come out to the end and if the railroad track is right above it, it can't undermine the railroad track, right?

A. Yes.

* * *

[Tr. 219, R. 152]

* * *

Q. If, sir, the eight and nine lines had been cased from outside of one railroad track to the outside of the other, when it ruptured it could not have caused a hole on Saturday or Monday, could it?

[Tr. 220, R. 153]

* * *

A. I don't believe you could have had that type of wash-out if it had been encased.

[Testimony of Ronald H. Dunn, Tr. 373, R. 306]

* * *

[Tr. 390, R. 323]

* * *

Q. All right, Mr. Dunn, are there certain standards and guidelines which apply to industry track and the operation of those tracks in construction and design?

A. I'm sorry, I do not –

Q. Are there standards and guidelines which apply?

A. Yes, sir.

Q. All right, is one of those the American Railway Engineering Association Standards?

A. Yes, sir.

* * *

[Tr. 392, R. 325]

* * *

Q. And do the standards and guidelines which are issued by the area constitute the industry standards for the operation, maintenance, design and construction of railroad industry side track including pipe lines?

A. That's true. The individual railroads sometimes adopt the standards of the area verbatim, sometimes they will because they feel that they have some unique circumstances area does not cover that's unique to their particular property they will modify those recommended standards of area. But by and large the standards of area are adhered to throughout the railroad industry.

* * *

[Tr. 397, R. 330]

Q. Mr. Dunn, I am going to give you back your copy. Would you tell the ladies and gentlemen of the jury if an industry wants to install a pipe line underneath an industry railroad track, what must they do?

A. It must notify the railroad with the details of the commodity to be conveyed in the pipe and that being whether it is flammable or inflammable, the location of it, the depth of it, the size of the pipe and the diameter of the casing and the thickness of the wall of the pipe casing itself.

Q. And they most notify the railroad?

A. Must notify the railroad and submit that information to the railroad for the railroad's approval and then proper coordination must take place so that a railroad can have a representative there to inspect [Tr. 398, R. 331] the installation of this facility under the track be it industry track or a railroad main track. At any rate if it is a track the railroad is going to operate over, it has to know.

Q. Can there be exception granted by the railroad to leave a pipe uncased?

A. Under industry track there can be exceptions granted by the engineer for the railroad and that engineer is the chief engineer of the railroad or his designated representative.

Q. Is that the industry's decision or the railroad's decision?

A. It's the railroad's decision solely.

Q. Mr. Dunn, I would like to go now since we have these standards established and ask you if Norfolk Southern has standards which apply?

A. Yes, Norfolk Southern has standards. They adopted the area standards.

Q. We've got the industry wide standard and now we have the specific Norfolk Southern. Tell us, are they the same or different?

A. They are the same.

Q. How do you know they are the same?

A. From the Norfolk Southern Orange Book.

Q. And what is the Orange Book, please sir?

A. The Orange Book is the Norfolk Southern standard that is entitled Guidelines for Design and Construction of Privately Owned Industry Tracks.

Q. Is a privately owned industry track the same as the United States Silica Track at Edmonds, South Carolina?

[Tr. 399, R. 332]

A. Yes, it is.

* * *

[Tr. 408, R. 341]

* * *

Q. Do you have an opinion whether this accident would have occurred and the way it did and where it did if U.S. Silica and Norfolk Southern had complied with the guidelines and standards which apply to the casing of pipes? Do you have an opinion?

A. Yes, I do.

Q. And what is that opinion?

A. The installation of a casing or the provision of a casing on that slurry line would not have prevented the pipe from rupturing, but it would have prevented a wash-out under the track.

Q. And would it have maintained a structural integrity and the safety of the track for operating the train and the men that work on them and fix the track?

A. Yes, sir, and that's predominantly because the area standards adopted by Norfolk Southern required that a casing through which a water line or fuel line is passing under a track extends twenty-five feet each way of the center line of the track.

* * *

[Testimony of Edward G. Cody, Tr. 614, R. 544]

* * *

[Tr. 639, R. 569]

* * *

Q. And Exhibit 14, in fact, contains to the extent the railway requires compliance with it it contains portions of these standards, doesn't it?

A. Yes, sir.

[Tr. 640, R. 570]

Q. It contains the standards with respect to piping under the tracks?

A. Yes.

Q. It contains the standards that you adopt with respect to casing?

A. Yes, sir.

Q. And absent an agreement with a company, a private company, and the private company builds its own track, doesn't it?

A. That's correct.

Q. It hires its own railroad contractor?

A. That's correct.

Q. And builds its track according to specifications?

A. That's correct.

Q. And pays for it?

A. That's correct.

Q. And absent an agreement with Norfolk Southern as to how they build it, they can build it any way they choose?

A. Their plans would have had to be approved by our engineering and design department before they could build the track.

Q. All right, do you have a record of any plans and specifications at U.S. Silica?

A. I'm not sure. I don't.

Q. But those plans and specifications would then tell you whether the piping that is underneath the track when it's built are encased or not.

A. Yes, sir.

* * *

[Testimony of C. A. Smith, Tr. 867, R. 792]

Q. Good afternoon, Mr. Smith.

A. Good Afternoon.

Q. Mr. Smith, do you work for Norfolk Southern Railroad?

A. Yes, sir.

Q. How long have you worked for the Norfolk Southern Railroad?

A. Almost twenty-eight years.

Q. And what is your job with Norfolk Southern Railroad?

A. Track supervisor.

[Tr. 868, R. 793]

Q. And one of your assistant track supervisor's, Dave Rogers, is the plaintiff in this case?

A. Yes.

Q. Are you familiar with the reason we are here with this lawsuit concerning the hole out at U.S. Silica?

A. Yes, sir.

Q. Have you been to this facility yourself?

A. Yes, sir.

Q. Did you, in fact, go there on the afternoon of June 28, 1993?

A. Yes, sir.

Q. Before you went did you receive a call from someone alerting you to something out at U.S. Silica?

A. Yes, I did.

Q. Who called you and what did they say and what did you do?

A. I believe I received a call from Mr. Roberson in Columbia. He is the superintendent of terminals in Columbia, South Carolina.

Q. I ask you if Mr. Pete Coleman, you know, he was the conductor involved, would he have called in to Mr. Roberson or somebody else?

A. Mr. Roberson or the yard master, whoever he got.

Q. And Mr. Roberson called you. And what did he tell you?

A. He told me that the loco was at U.S. Silica and there was a hole in the track and they were afraid to go across the hole and wanted somebody to come and inspect it.

Q. And so what did you do?

A. I sent Mr. Rogers to check it out.

* * *

[Tr. 876, R. 801]

* * *

Q. Do you have any idea, Mr. Smith, that in inspecting the repair that U.S. Silica made of the pipe on the Tuesday, June 29, following Mr. Rogers hurting his back made any determination as to whether or not the repair of that pipe or replacement of that pipe, were you aware that the pipe was, in fact, replaced?

A. The next day?

Q. Yes, sir.

A. No, I don't know what type repair was done.

Q. You are not aware of that?

A. No.

Q. Would you have been the person to instruct the assistant track supervisor or the person who is filling in for Mr. Rogers to go inspect the track?

A. Yes, sir.

Q. Did you instruct them to inspect the track to make sure the piping put under that track was encased?

A. No.

Q. You did not?

A. No.

Q. Have you at any time required to your knowledge that U.S. Silica encase any pipe running under the track?

A. Have I instructed them to?

[Tr. 877, R. 802]

Q. Yes, sir.

A. I haven't.

Q. Are you still the track supervisor in charge of the assistant track supervisor that inspects their premises?

A. Yes, sir.

Q. And so you did not instruct to your knowledge anybody before June 28, 1993 to ascertain that any pipes under their tracks be encased?

A. No.

Q. And did you not instruct anyone to determine that the repair of this on June 28th the repair or replacement of any pipes at that time be encased?

A. Well, the only way you would know that is if you were there when it was made.

Q. Do you recall that anyone has ever asked U.S. Silica whether the repair of that pipe the next day when they replaced it was encased?

A. I haven't.

Q. To your knowledge you never required U.S. Silica to encase any pipe?

A. That's not in my area of responsibility.

Q. But it is in your area of responsibility and those under you to inspect the industry track at U.S. Silica?

A. That's right, yes, sir.

Q. It is U.S. Silica's obligation and responsibility to perform the maintenance on their own track?

A. Yes, sir.

[Tr. 878, R. 803]

Q. They, in fact, own the track?

A. That's right.

Q. Do you and your track – assistant track supervisor even dictate to them how they will effect the repairs?

A. We tell them what repairs need to be made.

Q. Do you point them out to a problem that you have with the track either the rails are bent or whatever it may be and then they effect the repairs themselves?

A. That's right.

Q. So you are there to inspect and point out any problems?

A. Right.

* * *

[Colloquy between Court and Counsel, Tr. 980, R. 905]

* * *

[Tr. 986, R. 908]

* * *

The Court: They have a duty under the FELA to maintain a safe working place for their employees, don't they?

Mr. McMaster: Yes, sir, they do. They do that, but, again, there must be some evidence of negligence.

The Court: Well, isn't there facts in which it could be inferred that they breached their duty to require the co-defendant, U.S. Silica, to encase those pipes? There's testimony in the record, isn't there, from which that fact could be inferred? I'm not saying that that's what they will find, but isn't there evidence in the record?

Mr. McMaster: I think Mr. Dunn said that or something like that.

The Court: Mr. McKenzie, would you like to respond to that in any way or Mr. Tucker, I'm sorry.

Mr. McKenzie: If you have any question about it, obviously, they did not require U.S. Silica.

The Court: I think there's evidence in the record in which it could be inferred that the defendant railroad was negligent. All right.

* * *

APPENDIX F

[seal omitted]

The Supreme Court of South Carolina

DANIEL E. SHEARHOUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK FAX

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1090
(803) 734-1499

November 6, 2003

[names/addresses of counsel
for petitioner omitted]

Re: Rogers, John v. Norfolk Southern Corp.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ James E. Moore A.C.J.
s/ Costa M. Pleicones J.
s/ James C. Williams, Jr. A.J.

I would grant rehearing.

s/ John H. Waller, Jr. J.
s/ E. C. Burnett, III J.

November 6, 2003."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ DANIEL E. SHEAROUSE
CLERK

[notations omitted]

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

January 27, 2004

Mr. David C. Frederick
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: John David Rogers
v. Norfolk Southern Corp., et al.
Application No. 03A623

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on January 27, 2004 extended the time to and including March 5, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By
/s/ SANDY SPAGNOLO
Sandy Spagnolo
Case Analyst

[attached notification list omitted]

APPENDIX H

Statutory Provisions

The Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, provides:

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

45 U.S.C. § 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

45 U.S.C. § 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

45 U.S.C. § 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

(2)

Supreme Court, U.S.
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No. 03-1259

IN THE
Supreme Court of the United States

JOHN DAVID ROGERS,

Petitioner,

v.

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, on the unique facts of this case, a railroad may be held liable for an injury to one of its employees caused by the rupture of a slurry pipe at a sand company plant when no evidence was presented that the railroad had actual or constructive notice that there were pipes underneath the railroad track, that those pipes carried slurry under pressure, or that the sand company had violated standard engineering practices by failing to encase the underground portion of the pipe.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk Southern Railway Company states that its parent corporation is petitioner Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of Norfolk Southern Corporation's stock.

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BRIEF IN OPPOSITION

The decision below is not remotely worthy of review by this Court. The broad question set forth in the petition – whether a railroad has a duty under the Federal Employers' Liability Act (FELA) "to inspect third-party premises on which the railroad's workers are required to perform their duties," Pet. i, 7 – is not presented by this case, and petitioner's claim of a conflict of authority is contrived. To the contrary, the South Carolina Supreme Court expressly recognized the railroad's duty to exercise reasonable care in ensuring the safety of third-party premises for its workers, but (adopting the analysis of the court of appeals) held that there was no breach of any duty by the railroad. Pet. App. 7a-8a; Pet. App. 19a-22a (acknowledging railroad's duty to conduct reasonable inspections of third-party premises but finding no liability on the facts of this case). There is no reason for this Court to delve into the factbound question of what Norfolk Southern knew or should have known about certain slurry pipes at a particular South Carolina sand plant in 1993, when petitioner's arguments about the sufficiency of the evidence have been rejected by two levels of appellate courts; petitioner does not contest the standard of review applied; and resolution of that issue has no conceivable importance beyond this case. Not a single other reported FELA case involves injuries of railway workers from unencased pipes under railroad tracks (much less slurry pipes at sand plants). Furthermore, this case is not a proper vehicle even for resolution of that rare and factbound question, since there was no evidence in the record that Norfolk Southern even had constructive notice of the slurry pipes, and petitioner now espouses a theory of negligence he never argued to the jury.

STATEMENT OF THE CASE

A. Evidence at Trial

1. The accident in this case occurred on the grounds of a silica sand plant owned and operated by the U.S. Silica Company in Edmund, South Carolina. The Edmund plant produces two principal products: whole grain sand (referred to as "sand") and finely ground sand (referred to as "flour").

Norfolk Southern provides rail service to U.S. Silica's plant, operating its engine and cars over a spur track that runs from the railroad's main line to the U.S. Silica plant. U.S. Silica's predecessor built the spur track in 1961, and U.S. Silica owns and maintains it today. Norfolk Southern performs no maintenance on the spur track.

The spur track splits into two parallel tracks at the end, alongside the plant. The two parallel portions of the spur track are referred to as the "sand" and "flour" tracks. To serve the plant, Norfolk Southern leaves its cars on the sand and flour tracks for loading by U.S. Silica employees. Norfolk Southern trains come to the plant three days a week to leave empty cars and haul off full cars for shipment to U.S. Silica customers, such as glass and fiberglass companies.

2. On June 28, 1993, a Norfolk Southern train arrived at the plant. While waiting for U.S. Silica employees to finish loading cars on the flour track, the crew, consisting of a conductor and an engineer, left the train and took a break. When they returned, they discovered that a big hole of unknown origin had appeared beneath the flour track directly in front of the train. Several of the cross-ties were dangling from the rails over the hole. The Norfolk Southern conductor went inside and notified two U.S. Silica employees, who returned to the hole with him and examined it. The U.S. Silica employees made no comment or explanation to the crew about the hole, its cause, or any prior problems.

Norfolk Southern requires that a track supervisor examine any problem to determine whether a train can operate safely over a track. If not, the track supervisor orders the track out of service. The conductor called the railroad dispatcher to report the hole, and the dispatcher in turn relayed the message to the head track supervisor. The supervisor assigned petitioner Rogers, an assistant track supervisor, to inspect the track and the hole underneath it.

Rogers was a 19-year veteran of the railroad. Like all railroad track supervisors, Rogers's principal duty was to inspect tracks. After arriving at the U.S. Silica plant, Rogers began approaching the hole along the track. He stepped within one to two feet of the sandy edge of the hole to examine it. Suddenly, he sensed the ground beneath his feet giving way, and he jerked back away from the hole. At that moment, he felt pain in his back and so commented. Rogers reinjured his lower back, which had been injured in on-the-job incidents in 1985 and 1989 for which he had been compensated.

The cause of the hole was later determined to be the rupture of a pipe that carried slurry (a mixture of sand and water) underground beneath the spur tracks. The pipe that ruptured was called the "8 and 9 line," so named because it was associated with pumps 8 and 9, which are located alongside a factory building behind the spur tracks. This line was a 4-inch diameter Nypak (plastic) pipe. It ran 5 feet below the surface and underneath the tracks. It carried slurry out of the plant when there was an excess of sand in the plant. Unlike another pipe under the tracks that brought slurry into the plant, it was not encased because it was used less frequently and was expected to last longer.

There was testimony at trial that the pumping of slurry through pipes at pressure has a sandblasting effect on pipes. Once a pipe springs a leak, other leaks are certain, and the entire pipe has to be replaced. When leaks appeared, U.S. Silica employees would dig down to the pipe, put a band

around that spot in the pipe as a temporary patch, refill the hole, and later dig out and replace the entire pipe. When only slurry is pumped through a pipe, a rupture will cause sand and water to bubble up to the surface; no hole will appear in the sandy ground above the pipe, because the sand from the slurry is being discharged. But if water alone is pumped through the pipe, it will wash out the sand above the pipe, and the ground may cave in.

The underground pipe used on the "8 and 9 line" fractures approximately every 18 months to 2 years and requires replacement. Add. 5a (R. 214). The "8 and 9 line" pipe had blown out several times before – including June 26, 1993, two days before the accident in this case. *Id.* at 3a-5a (R. 172-173, 214). U.S. Silica employees had seen water and sand bubbling up, and so they placed a temporary band over the hole at that time and covered up the hole. Yet no U.S. Silica employee informed anyone at Norfolk Southern of the prior rupture of the 8 and 9 line pipe. *Id.* at 1a-2a, 3a, 4a, 15a-16a (R. 58, 62, 162, 178, 182, 794-795, 800-801, 803).

The uncontroverted evidence at trial was that Norfolk Southern never had any knowledge that there were pipes underneath the track, much less that those pipes carried slurry. Certainly Norfolk Southern had no notice the pipes were not encased underground in accordance with standard engineering practice. Add. 2a, 6a, 7a (R. 62, 271-272, 554). Indeed, Rogers was the railroad employee most familiar with the U.S. Silica plant. He had visited the plant 12 to 15 times, roughly once per month, to routinely inspect U.S. Silica's spur track during the year and a half he had been assigned to this territory. Rogers himself testified that he never knew of any pipes beneath the flour or sand tracks. *Id.* at 9a (R. 669).

It has long been Norfolk Southern's practice to negotiate a sidetrack agreement with an industry that it services with rail cars. The sidetrack agreement covers numerous issues, such as facilities the industry may operate near the track, the terms and conditions of operation, title, allocation of maintenance

and regulatory responsibilities and cost, clearances, indemnity, liability rules, car loading practices, signage, delivery, and rules for discontinuation of service. The track maintenance provisions require the industry to comply with the railroad's conditions. R. 1244.

Norfolk Southern follows the comprehensive standards set by the American Railroad Engineering Association (AREA). As relevant here, Part 5 of the 4-volume AREA manual includes a 19-page chapter setting forth engineering practices for pipelines near railroad rights-of-way. R. 1118-1136, R. 325. One provision in Part 5 deals with standards applicable to pipelines conveying nonflammmable substances, and provides that if a pipeline carries substances that "might cause damage if escaping on or in the vicinity of railway property," then any "[p]ipelines under railway tracks and across railway rights-of-way shall be encased in a larger pipe or conduit called the casing pipe," unless exclusions apply (such as approval by the railroad's engineer). R. 1132 (AREA §§ 5.3.1 & 5.3.2). Even apart from the AREA standards, standard engineering practices require casing around such pipes. R. 398.

Although there was no direct evidence whether the railroad had or had not sent the AREA standards to U.S. Silica, Norfolk Southern's Division Engineer testified that based on usual practice he assumed Norfolk Southern did so when the sidetrack (spur track) was first built by U.S. Silica back in 1961. Add. 8a-9a (R. 556, 643). Record evidence indicated that U.S. Silica's "failure to execute the sidetrack agreement was unrelated to the unencased pipes below the spur track." Pet. App. 20a n.8.

Even absent the sidetrack agreement, the U.S. Silica plant manager acknowledged that the company had a duty to notify Norfolk Southern if it ever wanted to install pipes beneath the tracks, and that he knew of the railroad and industry standards requiring that pipes under rail tracks should be encased. Add. 14a-15a (R. 762-764). Yet Norfolk Southern never received a

request, application, or notification concerning the presence or installation of pipes from this plant under the track, or any notification of any ruptures. *Id.* at 6a-8a (R. 548-549, 555).

Rogers argued to the jury that the negligence of both U.S. Silica and Norfolk Southern caused the unsafe condition that injured him. Rogers's theory of Norfolk Southern's negligence was that it failed to enter into a sidetrack agreement with U.S. Silica that would have incorporated its AREA standards. The jury found both defendants liable and awarded Rogers $3 million in damages for aggravation of a preexisting back injury, apportioning 70% of the fault to U.S. Silica and 30% to Norfolk Southern. Pet. App. 3a. The trial court upheld the verdict, and ruled that each defendant was jointly and severally liable to Rogers for the entirety of the judgment, and that the apportionment would be relevant only to any later action in contribution. Pet. App. 46a-47a.

B. Misstatements of Fact In the Petition

Respondents are obliged to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. The petition is replete with erroneous characterizations of the record, in large part because petitioner Rogers is attempting to muster evidence to support a constructive notice/duty-to-inspect theory of negligence that he never tried to the jury. As noted above, the *only* claim of negligence that Rogers presented to the jury – as can be seen from his counsel's closing statement to the jury, which is reproduced in its entirety in the addendum to this brief – was that Norfolk Southern was negligent in not refusing service until U.S. Silica signed a sidetrack agreement incorporating the AREA standards, and therefore the presence of the unencased slurry pipe on U.S. Silica's property was a breach of Norfolk Southern's duty to provide Rogers a safe workplace. Add. 16a-38a (R. 953-967, 985-996). That was also the theory and evidence on which Norfolk Southern's motion for directed verdict had been denied. Pet. App. 69a

(R. 908). That tenuous theory was rejected by the appellate courts below on multiple grounds, Pet. App. 20a-22a, and Rogers understandably does not seek review on that issue or even mention that theory in his petition.

Rogers's current theory that Norfolk Southern had constructive knowledge of the presence of slurry pipes under the property, and was negligent in failing to inspect those pipes to determine if they were encased, did not appear in the case until *after trial* when the trial court ruled on Norfolk Southern's posttrial motion for judgment notwithstanding the verdict. The trial court, apparently realizing that Rogers's sidetrack-agreement theory of negligence would not support the verdict, denied Norfolk Southern's motion on the grounds that "Norfolk Southern at least had constructive notice of the slurry pipes underneath the spur tracks at the U.S. Silica plant." Pet. App. 27a-28a. The trial court surmised that Norfolk Southern "was surely aware of the nature of U.S. Silica's slurry operations at the West Columbia plant, because Norfolk Southern track supervisors had been called to that facility on prior occasions to inspect the tracks," and "[t]hese facts alone" supported a finding of constructive knowledge. *Id.* at 28a. The trial court never explained what evidence supported an imputation of knowledge of slurry operations to Norfolk Southern track inspectors, when the railroad simply delivered and picked up cars that U.S. Silica loaded with *dry* sand products for transportation to customers. There was not a shred of testimony that railroad employees knew or should have known what slurry was; knew or should have known that U.S. Silica operations involved slurry; knew or should have known that slurry can cause pipe ruptures; knew or should have known that the pieces of equipment near the track were slurry pumps; knew or should have known that there were pipes running from those pumps underneath the railroad tracks; or knew or should have known that those pipes were not encased. Rogers simply never tried a constructive notice or duty-to-inspect case to the jury, and

indeed never requested an instruction defining constructive notice. Cf. *id.* ("constructive notice" is "'knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the *duty of inquiring into it.*'").

Both in the state appellate courts and in this Court, Rogers has attempted (unsuccessfully) to cobble from the record evidence that might support the inspection theory he never tried to the jury. In doing so, petitioner misstates record evidence or takes it wholly out of context. The petition's description of Norfolk Southern's putative negligence begins with the statement that "[d]espite the frequency with which Norfolk Southern employees were at the U.S. Silica facility, Norfolk Southern never inspected that premises (or otherwise inquired) to determine whether the slurry pipes that ran under the track were cased in the manner required by industry standards." Pet. 4. The petition supports this contention only by citing to excerpts of the testimony of the Norfolk Southern track supervisor (Smith) that he never required U.S. Silica to encase pipes running underneath the track, or instructed anyone to inquire whether those pipes were encased. Pet. App. 67a-68a (R. 802-803). But the petition conveniently omits Smith's prior testimony explaining why: namely, that he never knew that there were any slurry pipes running underneath the track! Add. 16a (R. 795) ("Q: Did you know that there were high pressure slurry pipes running underneath that track? A: No."). A track supervisor will not issue instructions to encase pipes underneath tracks if he does not know of their existence. Nor, as noted above, was any testimony adduced to prove that Smith or any other railroad employee should have known of those pipes or inspected for them.

Next, the petition states that "Norfolk Southern failed to take these actions even though the record, including photographic evidence, showed that the slurry pipes were

visible – indeed, they ran above-ground for a full quarter of a mile after coming out of the ground on the side of the track – and even though the nature of the plant strongly indicated that slurry would need to be conveyed across the rail line." Pet. 4. At the outset, it is important to note the testimony that Rogers invokes in support of this claim did not purport to address what would have been visible to Norfolk Southern employees from the spur track; petitioner is simply taking snippets from the testimony of U.S. Silica employees (and accompanying exhibits) about the location of the slurry pipe that ruptured, and trying to retrofit the testimony to his new theory.

In any event, that single statement in the petition mischaracterizes the record in multiple respects. First, in the excerpted testimony, James Gentry, an employee of U.S. Silica who worked as a mill helper maintaining slurry pumps, did not address the visibility of the 8 and 9 line pipe as it entered the ground from the pumps adjacent to the building near the spur track. He testified only that he had seen the pipe "as it comes *out of* the ground, then I can see it" because there "it's exposed." Pet. App. 54a (R. 90) (emphasis added). Indeed, Gentry could not identify exactly where under the track the underground portion of the pipe ran. *Id.* (R. 89) ("It runs out that way, but where I don't know.").

Second, the petition states that the 8 and 9 line slurry pipe "ran above-ground for a full quarter of a mile after *coming out of the ground on the side of the track*." Pet. 4 (emphasis added). The statement is factually incorrect. The slurry pipe does not come out of the ground on the side of the track, and there is no testimony or photographic evidence to that effect. In fact, all the evidence is to the contrary. The only evidence the petition cites is the later testimony of Gentry while looking at an *aerial* photograph of the plant (Exh. 1, R. 1097). Gentry testifies that the 8 and 9 line runs out to a big sand pile south of the plant, and that in the "lower left hand portion of Exhibit No. 1" one can see the pipe emerge and run roughly a quarter mile to the sand pile. Pet. App. 55a (R. 115). But the

tracks are in the lower right-hand portion of the aerial photograph (in horizontal view), and (although Gentry does not testify as to the distance from the tracks, and the photograph is not scaled) the thin line on the photograph would appear to emerge somewhere in the range of 125 to 150 feet from the tracks. See also Add. 5a (R. 217) (140 feet of pipe used to replace the underground pipe after the accident). The pipe does not emerge at the side of the tracks.

Even more critically, there was no testimony that the exposed portion of the pipe some 125 to 150 feet away would have been visible to any Norfolk Southern employee working on or inspecting the spur track. The various photographs in evidence (including Exhibit 1) indicate both a wall of high shrubbery and large sand piles obscuring any view of the land west of the tracks where the exposed pipe emerged. R. 1097-1106. But these facts were never adduced at trial because Rogers never tried a constructive notice or duty-to-inspect case to the jury, or sought to tie Norfolk Southern's putative negligence to the visibility of pipe. His current appellate theory of negligence seems to rest upon the implausible premise that Norfolk Southern has a duty to conduct aerial surveillance of customer sites for any indications of possible hazards, but this was not a theory that was submitted to the jury.

Third, there is no testimony whatsoever that supports the petition's claim that "the nature of the plant strongly indicated that slurry would need to be conveyed across the rail line," and the petition cites none. Pet. 4. There is no testimony that operationally the plant had to discharge slurry to the west (underneath the tracks), as opposed to north, south, or east. More to the point, there was no testimony to establish that anyone at the railroad was or should have been aware of the slurry operations, or that the railroad could be charged with knowledge of the claimed necessity that U.S. Silica had to run pipes under the tracks in order to discharge excess slurry from the plant. Rogers himself said that he did not know anything

about the plant except that it produced sand. Add. 13a (R. 708-709). Once again, the railroad's notice of slurry operations and discharges at U.S. Silica's plant was not an issue at trial.

Indeed, there is rich irony in Rogers's current claim that the pipes were plainly visible to Norfolk Southern inspectors when he was the Norfolk Southern inspector with principal responsibility for the U.S. Silica spur track. At trial, Rogers testified that he never noticed the pipes on his many inspections of the U.S. Silica track. Add. 11a-12a (R. 707-708). If (contrary to fact) Rogers's theory at trial had been that Norfolk Southern was negligent for failing to see pipes in plain view that should have prompted further inspection or inquiry, he could not have prevailed; an injured employee cannot seek to hold a railroad liable for his own negligence. *Atlantic Coast Line R.R.* v. *Driggers*, 279 U.S. 787, 792 (1929).

Finally, Rogers asserts that "a Norfolk Southern engineer testified that Norfolk Southern reviewed the plans and specifications of all sidetracks, including the one at U.S. Silica's facility, and that those plans would have shown the piping under the tracks." Pet. 4; *id.* at 9. That is untrue; the engineer (Cody) did not testify Norfolk Southern would have reviewed plans or specifications showing the 8 and 9 line slurry pipe. In the testimony cited in the petition, Cody testified that before a private company could build a track that would be used by Norfolk Southern, "[t]heir plans would have had to be approved by our engineering and design department *before they could build the track*." Pet. App. 63a (R. 570) (emphasis added). Cody testified that he had no record of the U.S. Silica plans and specifications. *Id.* Rogers's counsel then asked hypothetically, "But those plans and specifications would then tell you whether the *piping that is underneath the track when it's built* are encased or not?," to which Cody replied, "Yes, sir.'" *Id.* at 64a (emphasis added).

Cody thus testified (based on his experience) that when the U.S. Silica spur track was built, Norfolk Southern would have reviewed plans and specifications in advance that should have shown whether any piping underneath the track *at that time* was encased. The U.S. Silica spur track was built in 1961, Add. 8a (R. 556); R. 1229; the year in which the 8 and 9 line was first laid was unknown. Add. 2a-3a, 5a (R. 156, 214). The only plan of the U.S. Silica site that was in the record was a detailed plat drawn in 1980, and that plan does not show the 8 and 9 line pipe. R. 1245. Thus, the only inference that might be drawn from the record is that the 8 and 9 line pipe had *not been built* by 1980, and therefore Norfolk Southern did *not* have notice of such a pipe when it reviewed the spur track plans in 1961. In short, the evidence does not support Rogers's current theory, and he never tried a duty-to-inspect or constructive notice case to the jury.[1]

---

[1] Rogers's counsel did raise one inspection-related theory of negligence in closing that was outside the record, and that Rogers has not advanced in the petition. Counsel stated in his summation that "[t]he railroad had another department that came out there and was supposed to look to see if the pipes were under the track and if the pipes were cased and if the pipes were proper there, but they didn't do that." Add. 32a (R. 989). There was no testimony to that effect. His counsel had asked Rogers during direct examination whether any other Norfolk Southern department had the responsibility for "going out to U. S. Silica and inspecting the pipes that might run under the track." Add. 9a (R. 669). Rogers could not testify truthfully that the Bridge and Building Department had any responsibility for inspecting customer factory pipes, so he gave the nonresponsive answer that "[t]he Bridge and Building Department has the ultimate responsibility of checking or inspecting and checking culverts, water lines, that type stuff." *Id.* Rogers later admitted on cross examination that that department only inspected bridges and buildings that were "railroad property" and "big culverts[] that go under the main line of the railroad," and that he had never seen any such facilities at U.S. Silica. *Id.* at 10a-11a (R. 699-700). Norfolk Southern objected to this argument at closing as outside the record, and the trial court admonished Rogers's counsel to confine his argument to the record. Add. 32a (R. 989).

C. Appeals In State Court

After the trial court entered judgment in favor of Rogers, both Norfolk Southern and U.S. Silica appealed. Rogers settled with U.S. Silica while the case was pending before the court of appeals. In Norfolk Southern's appeal, Rogers attempted to press his post-hoc theory of constructive notice in defending the judgment, but both the court of appeals and the state supreme court rejected it.

1. The court of appeals held that "'under the FELA, 'plaintiffs are still required to prove traditional common law elements of negligence: duty, breach, foreseeability, and causation,'" but even slight evidence of negligence would suffice. Pet. App. 15a (alteration omitted) (quoting *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 249 (4th Cir. 1994)). The court further held that Norfolk Southern had a duty to exercise reasonable care to provide a safe workplace to its employees, and that "'[t]his duty exists even when the employees are on the premises of a third party over which the employer has no control.'" *Id.* at 16a. A railroad is not under an absolute duty to remove all workplace dangers, and the key issue in negligence is reasonable foreseeability of the harm. *Id.* "'Events too remote to require reasonable prevision need not be anticipated.'" *Id.* at 19a (quoting *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 483 (1943)). The court further stated that

> "[t]he employer must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. But even under the FELA, an employee still must establish that the employer was guilty of some act of negligence in order to recover."

Id. (quoting *Norfolk S. Ry.* v. *Trimiew*, 480 S.E.2d 104, 106 (Va. 1997)).

Applying this law, the court of appeals found no negligence as a matter of law. It rejected the trial court's conclusion that the railroad "had constructive notice of the slurry pipes underneath the spur tracks at the U.S. Silica plant" as unsupported by the evidence:

> there is no indication from the record that Norfolk had any reason to know that U.S. Silica had slurry pipes running under its spur tracks, much less that these pipes were not encased as required by the AREA standards and by general engineering standards. Even when the conductor found the hole on the afternoon in question, none of U.S. Silica's personnel made any mention of the slurry pipes below the tracks or that such a pipe under the track had burst two days before this incident. Norfolk cannot be expected to know the operational details of a sand plant or of the placement of pipes it did not know even existed.

Id. at 18a-19a. Accordingly, Rogers had failed to establish the foreseeability element of his negligence cause of action:

> We hold it was not reasonably foreseeable that Rogers would be injured by inspecting the track or a hole under the tracks at this location. Unless a Norfolk employee saw or knew of the prior pipe leaks, or at least knew that pipes were in the ground beneath the tracks, it is impossible for Norfolk to have had actual or constructive knowledge of any danger at this location.

Id. at 19a. Given Norfolk Southern's lack of knowledge regarding the existence of the unsafe condition, it "also could not have provided Rogers with any warnings that would have prevented his injury."[2]

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[2] Having dispensed with the trial court's reasoning, the court of appeals also rejected on multiple grounds the (now abandoned) theory that Rogers pressed at trial that Norfolk Southern was negligent in providing service to U.S. Silica before the latter had signed the sidetrack agreement. Pet. App. 20a-22a. The court of appeals also did not have occasion to address the

2. The South Carolina Supreme Court affirmed. Like the court of appeals, the state supreme court held that "Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party." Pet. App. 5a. But that duty only extends to foreseeable dangers. *Id.* "'The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.'" *Id.* at 7a (alteration omitted) (citing *Isgett* v. *Seaboard Coast Line R.R.*, 332 F. Supp. 1127, 1139 (D.S.C. 1971)). Reviewing the record, the supreme court concluded that "[w]e fail to see how, in this instance, Norfolk Southern could have been any more prudent." *Id.* It sent Rogers out as "the first responder" to inspect the danger when it was informed of the hole. As to the claims of prior constructive knowledge, the supreme court held that "[w]e agree with the Court of Appeals that Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site," citing to the page of the court of appeals opinion where the lower court held that Norfolk Southern "had no knowledge, actual or constructive, that the underground slurry pipe which caused the hole was installed beneath U.S. Silica's spur track." *Id.* (citing *Rogers* v. *Norfolk S. Corp.*, 538 S.E.2d 664, 669 (S.C. Ct. App. 2000) (Pet. App.17a)). "The law does not require that employers be omniscient, only that they exercise reasonable care." *Id.* Although it took issue with the lower court's description of the standard of review,[3]

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clear excessiveness of the $3 million verdict (most of which were noneconomic damages) for the aggravation of a prior back condition where the plaintiff had two prior back injuries and surgeries and degenerative disc disease since at least 1985, and had been golfing "a dozen times" *after* the U.S. Silica accident. Add. 9a-10a (R. 696-697).

[3] The court of appeals had invoked both the state and federal standard for review of jury verdicts. Pet. App. 15a, 17a-18a. The state supreme court determined that there was a difference between the two standards,

the South Carolina Supreme Court held that "[t]he Court of Appeals arrived at the correct result as to all allegations of negligence." *Id.* at 7a-8a. Two justices dissented. *Id.* at 8a-10a.

REASONS FOR DENYING THE PETITION

There is not the slightest reason for this Court to review the decision below. The claim of a conflict with precedent of this Court and other lower courts is illusory; Rogers misconceives the law regarding an employer's duty to inspect the property of third persons; the question of whether Norfolk Southern had constructive notice of potentially dangerous pipes is factbound and of no conceivable relevance beyond this case; the negligence theory espoused in the petition was not the one tried to the jury; Rogers's claims of constructive notice are based on mischaracterizations of the record; and the other codefendant was held jointly and severally liable for the entirety of Rogers's damages. In sum, certiorari should be denied.

Rogers trumpets this case as involving "a split of authority ... on a significant and recurring issue under the FELA: whether railroads have a duty to inspect third-party premises where their employees work." Pet. 7. The problem for Rogers is that the South Carolina Supreme Court never held that the railroad has "no duty to inspect third-party premises to find and to correct potentially dangerous conditions before injuries occur." *Id.* at 17. Quite to the contrary, the court below expressly held that the railroad's duty to exercise reasonable care to provide a safe workplace extends to third-party premises. Pet. App. 5a. It relied on the Virginia Supreme Court's decision in *Trimiew*, *id.*, which characterized the duty to provide a safe workplace as

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and that the court of appeals should not have invoked the state standard, but held that the result would be the same under the federal standard for the reasons given. *Id.* at 3a-5a, 8a. Petitioner does not take issue with the standard of review applied by the South Carolina Supreme Court.

including the duty to conduct reasonable inspections. *Norfolk S. Ry.* v. *Trimiew*, 480 S.E.2d 104, 106 (1997). Indeed, the South Carolina Supreme Court below stated the substantive legal standard in language directly drawn from this Court's opinions.[4]

Furthermore, the South Carolina Supreme Court adopted the analysis of the court of appeals as to "all allegations of negligence," Pet. App. 8a, and the court of appeals (quoting *Trimiew*) expressly held that a railroad "'*must conduct proper inspections to discover dangers in places where employees are required to work*, and must take reasonable precautions for the employees' safety after determining the existence of such dangers.'" *Id.* at 19a (emphasis added). The state supreme court never questioned this statement of substantive law. Thus, contrary to petitioner's claims, the state supreme court did not reject the duty to inspect third-party premises. Instead, like the court of appeals, it simply found that Rogers failed to establish the factual predicate for his post-trial theory. *Id.* at 7a.[5] Rogers's attempt to claim a circuit conflict

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[4] *Compare* Pet. App. 5a ("Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party"), *with Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 7 (1963) ("a railroad has the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control"); *compare* Pet. App. 7a ("'[t]he employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.'") (alteration in original), *with Baltimore & Ohio S.W. R.R.* v. *Carroll*, 280 U.S. 491, 496 (1930) ("The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools, and appliances, but only to the duty of exercising reasonable care to that end.")

[5] Rogers oddly characterizes the holdings of the state court of appeals and supreme court that Norfolk Southern was not chargeable with knowledge of the risks posed by the slurry pipe as a "rule of law," Pet. 15, when both courts clearly addressed only Rogers's failure of proof.

with every court that has recognized a duty to inspect third-party premises (see Pet. 12-15) is a mirage.

Indeed, it is Rogers (not the state supreme court) who is out of step with established law on inspection of third-party property. The duty of a railroad to ensure a safe workplace on third-party property existed at common law even prior to FELA. See, *e.g.*, *Baltimore & Potomac R.R.* v. *Mackey*, 157 U.S. 72, 89-91 (1895). Moreover, the common law rule (applicable to all employers, not just railroads) does not require the employer to inspect all third-party property that might conceivably pose hazards to its employees. Rather,

> [a]n employer has the duty to inspect and keep in repair premises or instrumentalities of another which are used by his employees *where he has control thereof, or the right to inspect and repair, or if he directs an employee to use them*; but this duty does not extend to premises over which he has no control and to which the employee goes on a temporary service.

30 C.J.S. *Employers' Liability* § 89, at 490 (1992) (emphasis added). The case on which Rogers principally relies, *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1 (1963), is fully in accord with this definition. In *Shenker*, this Court held that where a railroad "required [the employee] to work with cars belonging to" another carrier, the railroad had a duty to inspect the foreign cars. See also *Nivens* v. *St. Louis S.W. Ry.*, 425 F.2d 114, 120 (5th Cir. 1970) (where railroad required its employees to use the tracks of another railroad, the railroad was under a duty to inspect the culvert supporting the tracks).

Here, the third-party property that Norfolk Southern required its employees to use was the U.S. Silica spur track (which Norfolk Southern neither owned nor maintained), and it is undisputed that Norfolk Southern performed continuous inspections of that property, and did so *before* any dangerous conditions appeared. Pet. App. 17a n.6, 19a n.7. It is also

undisputed that the presence of casing around an invisible underground pipe is a latent defect not discoverable by the ordinary and reasonable inspection of the spur track that inspectors like Rogers himself conducted. In his persistent refrain that Norfolk Southern "never inspected" the property for compliance with engineering standards, Pet. 1, 4, Rogers is instead postulating a much broader and unreasonable duty to inspect "the entire pertinent premises," *id.* at 16, that no other court has ever recognized. He would impose upon the railroad a duty (1) to inquire into customer manufacturing processes (here, the generation of slurry) to determine whether any substances were generated and discharged in a way that could cause a pipe to rupture; and (2) to inspect other parts of the plant *not used* by railroad employees for indications of structures (here, the plant pipe network) that might potentially pose latent risks to employees working on the spur track.

Such a novel duty to inspect "the entire pertinent premises," *id.*, would be unreasonable and unprecedented. As the court of appeals stated, "Norfolk cannot be expected to know the operational details of a sand plant or of the placement of pipes it did not know even existed." Pet. App. 18a-19a. Under petitioner's theory, a railroad would be under a continuous duty not just to inspect the customer's tracks, but to inspect the customer's plant (for example) for electrical wiring in buildings near the track that might conceivably pose a fire risk, or fuel or chemical tanks that might pose explosion risks, or smokestacks or other facilities emitting chemicals or fumes near the tracks that might pose long-term health risks to employees. Indeed, since it is always possible that invisible pipes could run underground from the foundation of any nearby building underneath the tracks, petitioner would presumably place the railroad under a continuous duty to inspect *every* third-party building in the vicinity of a customer spur track (or for that matter alongside any tracks in the railroad's entire system).

The law has never imposed such duties of inspection on an employer beyond property it directs its employees to use, and more to the point, there is no circuit conflict on that question. All of the cases relied upon by Rogers involve the duty to inspect third-party property that the railroad directed its employees to use or occupy. *Shenker*, 374 U.S. 1 (1963); *Nivens*, 425 F.2d 114 (5th Cir. 1970); *Lockard* v. *Missouri Pac. R.R.*, 894 F.2d 299 (8th Cir. 1990) (dangerous condition at a boarding house where the railroad directed its employees to stay); *Empey* v. *Grand Trunk W. R.R.*, 869 F.2d 293, 296 (6th Cir. 1989) (same); *Cazad* v. *Chesapeake & Ohio Ry.*, 622 F.2d 72 (4th Cir. 1980) (dangerous condition on property where railroad employee was repairing equipment); *Payne* v. *Baltimore & Ohio R.R.*, 309 F.2d 546, 549 (6th Cir. 1962) (operation of car on hazardous spur track of another).

Here, even though the unencased underground slurry pipe was not discoverable by reasonable inspection of the spur track itself, the state courts were open to proof that might otherwise establish the reasonable foreseeability of the condition that injured Rogers. See *Brown* v. *CSX Transp., Inc.*, 18 F.3d 245, 250 (4th Cir. 1994) (holding that absent showing that the railroad had prior notice of problem or that reasonable inspection would have uncovered the problem, plaintiff had failed to prove element of reasonable foreseeability). But Rogers adduced no facts probative even of Norfolk Southern's notice of slurry pipes underneath the track: "Unless a Norfolk employee saw or knew of the prior pipe leaks, or at least knew that pipes were in the ground beneath the tracks, it is impossible for Norfolk to have had actual or constructive knowledge of any danger at this location." Pet. App. 19a. Rogers disputes this factual conclusion, Pet. 4, 19, but as demonstrated above his contentions are unfaithful to the record. See *supra* at 7-12. In any event, there is no reason why this Court would wish to become embroiled in a factbound question about what Norfolk Southern knew or should have known in 1993 about

the existence of underground slurry pipes at one South Carolina sand plant. This is especially so since Norfolk Southern has not discovered any other reported FELA case involving railroad employees injured from ruptures of unencased pipes underneath tracks (slurry or otherwise). The accident here was a freakish event attributable to the unforeseeably gross negligence of U.S. Silica in not following standard engineering practice, and in not complying with its acknowledged obligations to inform Norfolk Southern of the pipes underneath the track.

Finally, quite apart from any question of conflicts on issues of law, Rogers claims a right to have this Court review the factbound question of the sufficiency of the evidence, even though he does not contest the more-than-a-scintilla legal standard of sufficiency that the South Carolina Supreme Court employed. Pet. 18-21. But this Court does not review the application of law to facts except in the most extraordinary circumstances. Sup. Ct. R. 10; *Kyles* v. *Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) (capital case). This Court did undertake such review for a short period in the middle of the last century when the state courts routinely took FELA cases away from the jury by applying improper common law standards, but that period has long since passed. Even in that period, however, this Court commonly denied petitions seeking review of judgments taking a FELA case away from the jury or overturning a jury verdict, *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 21-22 (1959) (per curiam) (Douglas, J., concurring) (noting 27 such cases between 1949 and 1958), and upheld many judgments for defendants as a matter of law.[6] Moreover, petitioner's

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[6] *See, e.g., Herdman* v. *Pennsylvania R.R.*, 352 U.S. 518 (1957); *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573 (1951); *Reynolds* v. *Atlantic Coast Line R.R.*, 336 U.S. 207 (1949) (per curiam); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926); *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921).

claim that the South Carolina Supreme Court engaged in "extraordinarily … aggressive" review of a jury verdict, Pet. 9, is not only factbound, but is incorrect and rests on mischaracterizations of the record. *Supra* at 7-12.

Even if petitioner's theory were not so baseless in law and fact, Rogers faces the insuperable vehicle problem that he never presented his current theory of negligence to the jury. See *supra* at 6-7 & 12 n.1. The South Carolina Supreme Court can hardly be accused of invading the province of the jury, Pet. 19, by refusing to countenance a theory that Rogers never presented at trial, much less supported by evidence. There was no testimony (or argument) that established what the railroad should have known about slurry operations or about the practice (using water at pressure to clean the slurry out of the pipe) that actually washed away the sand under the track; whether railroad employees should have known the function of the equipment or pipes adjacent to the building; which pipes were visible to railroad employees in the course of their work; on what basis they should have concluded that the pipes ran under the tracks; what property should have been inspected; what would have constituted a reasonable inspection; and whether the latent defect of the unencased pipe was discoverable by such inspection. *Deans* v. *CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) ("while it is true that FELA imposes on the railroad carrier a duty to take reasonable precautions to inspect the workplace and protect its employees from possible danger, the plaintiff still carries the burden of proving some act of negligence by the carrier") (citation omitted). Rogers's duty-to-inspect theory is an afterthought to salvage an unsustainable verdict. "'Where the plaintiff tries his case on one theory in the District Court, without any indication of other possible theories, he will not ordinarily be heard to press other theories on appeal,'" and his verdict "cannot be sustained on a theory that was never

presented to the jury." *Sinclair* v. *Long Island R.R.*, 985 F.2d 74, 77-78 (2d Cir. 1993) (alteration omitted) (citing cases).[7]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[7] Finally, not only is this case unworthy of review, but also it does not involve an uncompensated plaintiff. Under the trial court judgment, both U.S. Silica and Norfolk Southern were 100% liable to Rogers under the judgment for the entirety of the $3 million in damages (with the jury's apportionment of 70% of fault to U.S. Silica and 30% to Norfolk Southern relevant to any future actions in contribution). Pet. App. 46a-47a. Rogers has received settlement from U.S. Silica, the only party that was negligent in this case.

ADDENDUM

ADDENDUM

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,

Defendants.

TRANSCRIPT OF RECORD

(December 2-6, 1996)

Before: The Honorable Paul E. Short, Jr., Judge and a Jury

* * * *

[Testimony of Allen Corbitt Coleman, Tr. 118, R. 58]

Q. Did anybody tell you anything about why that hole – that there had been a hole there two days before?

A. No Sir.

* * * *

[Tr. 122, R. 62]

Q. Okay, here's the question. They didn't tell you at any time did they, these are U. S. Silica employees, that we had a blow-out on that same pipe on Saturday? Did they tell you that?

A. No, Sir.

Q. Did they tell you that there was a high pressure water pipe going underneath that track?

A. No, Sir.

Q. Did they tell you that there was a high pressure slurry line that wears out from time to time going under that track?

A. No, sir.

Q. Did you ever know until this case got started that there was any kind of high pressure line running under that track?

A. No. Sir.

* * * *

[Testimony of James Willard Holmes, Tr. 204, R. 137]

Q. Well, isn't there another way? You have got a culvert or casing pipe and you have got a Nypak pipe in the middle of it, okay? Slurry doesn't eat the pipe out regularly, does it?

A. Yes, it does.

Q. It eats it out all along the –

A. You will find in a slurry line that it typically eats it out at the bottom all of the time.

* * * *

[Tr. 223, R. 156]

Q. Okay, why was the eight inch line encased, the slurry line, but the four inch slurry line that also went under the track was not encased?

A. Because and I tried to answer this question earlier because the wear on the eight inch line is several times greater, you know, the life expectancy of that line is significantly less than it is with the eight and nine line and that other line had been there I don't know how long, you know, probably several years before the – that's the eight and

nine line – so the main reason the other one was encased was because it had to be repaired more frequently.

* * * *

[Tr. 229, R. 162]

Q. Did anybody to your knowledge alert the railroad that is prior to John Rogers' incident on June 28, 1993, did anybody at U. S. Silica alert the railroad that that pipe had burst on Saturday?

A. Not to my knowledge.

* * * *

[Testimony of Gilberto Lopez, Tr. 239, R. 172]

Q. Was it cased in 1993?

A. No.

Q. And on Saturday before Mr. Rogers got hurt on Monday did a leak occur in the eight and nine four inch slurry pipe under the flour track?

A. On the weekend.

Q. Yes, on Saturday?

A. Yes.

Q. Between the rails below the track.

A. I couldn't tell if it was between the rails.

Q. But it was underneath that track?

[Tr. 240, R. 173] A. Yes.

Q. Okay and was it patched that day?

A. On the weekend, yes.

Q. But it was not replaced until after Mr. Rogers was hurt, is that correct?

A. The line, yes.

Q. Okay and when, in fact, it was replaced, –

Mr. Boston: Your Honor, I am going to object to his leading the witness. He needs to ask him questions.

The Court: All right, overruled.

Q. When it was replaced, how much of the pipe was replaced?

A. According to the time cards?

Q. Yes.

A. One hundred and forty feet.

* * * *

[Tr. 245, R. 178]

Q. Okay. And there was a leak in the slurry pipe and that is what had caused the problem, correct?

A. That's what they told me, yes.

Q. Did you report that to the railroad?

A. No, because it had already taken care of on the weekend.

* * * *

[Tr. 249, R. 182]

Q. Mr. Lopez, you never did notify the railroad of any of these holes or problems with this pipe, did you?

A. No.

* * * *

[Testimony of William Brown, Tr. 281, R. 214]

Q. And this pipe, this four inch polyurethane pipe, it had broken before and caused holes in it?

A. Yes, sir.

Q. And this happens on a fairly – and I don't mean every day, but I mean on a fairly regular basis, it's something you know is going to happen?

Mr. Trucker [sic]: Line 5

A. Well, are you just specifically talking about the 8 and 9 line or …

Q. Yes, the polyurethane pipe.

A. No, sir, it's a pretty durable pipe. And this pipe that we're talking about now has probably been in there since a year and a half. I don't think we've replaced it since then.

Q. Would you say that it fractures then maybe every year and a half to two years?

A. Yes.

Q. Okay, do you know ehn [sic when] that pipe – not this piece, obviously, since it must have been repaired or replaced before, but do you know when that line was put under there, under the track, originally?

A. No, sir.

* * * *

[Tr. 283, R. 216]

Q. Do you have any account for why they had to replace 140 feet of the 8 and 9 discharge pipe?

[Tr. 284, R. 217] Mr. Tucker: Line 16.

A. I would say that's the – 140 feet is – from the discharge hose off the 8 and 9 pump. The rubber hose stops right at the pump side of the track. The 140 feet was probably replaced from there over to wherever it comes out of the ground at which is over there by the little building over there.

* * * *

[Testimony of Alan J. Groleau, Tr. 338, R. 271]

Q. Okay. You didn't know that there was any high pressure water or slurry pipe running under the track, did you?

A. No, sir.

[Tr. 339, R. 272] Q. Nobody from U. S. Silica told you anything about that?

A. No. sir.

* * * *

[Testimony of Edward G. Cody, Tr. 618, R. 548]

Q. Are you familiar with the pipeline requirements for putting pipe underneath the track at a plant such as a U. S. Silica plant at Edmonds, South Carolina, the area guidelines?

A. Yes, sir.

Q. And are those the same guidelines as the Norfolk Southern Guidelines?

A. Yes, sir.

Q. And what are those requirements as far as being cased?

A. Pipelines have to be encased under railroad tracks.

Q. All right, and there is an exception, however, if the division engineer or chief engineer of the railroad grants it, is that correct?

A. Yes, sir.

Q. Has one ever been granted as to the pipe under U. S. Silica?

A. Not that I'm aware of.

Q. Also does not the industry have to notify you of each time they repair or replace a track so that you can observe it and be sure that there is no endangerment to the track?

[Tr. 619, R. 549]A. Yes.

Q. Has that ever been done?

A. Not that I'm aware of, no.

* * * *

[Tr. 624, R. 554]

Q. Prior to this accident or this date of this incident on June 28, 1993, you did not know there were slurry pipes running under that track, did you?

A. No, sir.

Q. How long have you been the Division Engineer?

A. For this territory?

Q. Yes, sir.

A. Since February of 1989.

* * * *

[Tr. 625, R. 555]

Q. Okay, when an industry like U. S. Silica wants to put a pipe under the track, isn't there an application they are supposed to fill out?

A. Yes, sir.

Q. I'll show you on plaintiff's exhibit number 14 is that a – is that the application?

A. Yes.

Q. Now did you look through the records at the railroad to see if there had been an application filed by U. S. Silica for putting pipes under this track?

A. I had no records in our office.

Q. My first question is did you look?

A. Yes, sir, and the office in Greenville, the headquarters there, we looked.

Q. And what did you see?

A. We had no record.

[Tr. 626, R. 556]Q. All right, these guidelines that we are talking about has the railroad been giving them out for some time?

A. Yes, sir.

Q. Okay, do you know when this plant were constructed, when these pipes were built?

A. No, sir, I don't.

Q. What is the policy of the railroad, that is, when does it give an industry in its usual procedure when, if at all, does it give an industry that is going to go into a relationship with the railroad in hauling and shipping, when would it give them a copy of this information?

A. When the tracks are built.

Q. So if these tracks were built back in 1961, that would have been done in 1961?

A. Yes, sir.

* * * *

[Tr. 713, R. 643]

Q. But, in fact, you have no information to indicate that anyone with Norfolk Southern ever notified U. S. Silica of those requirements, do you?

A. No, I just had to assume they did.

Q. Just assume it. You don't know.

A. No.

Q. You assume it because the train is operating on the track?

A. No, the policy that when a track is built the plan have to be approved by the Design Department and at that time also that the information, everything, is given out. That's the way its been done since I have known it.

* * * *

[Testimony of John David Rogers, Tr. 739, R. 669]

Q. Okay, do you know of any individual or department of the railroad who did have the responsibility of going out to U. S. Silica and inspecting the pipes that might run under the track?

A. The Bridge and Building Department has the ultimate responsibility of checking or inspecting and checking culverts, water lines, that type stuff.

Q. Are you in the Bridge and Building Department?

A. No, sir, that's a separate department.

Q. Were you ever asked to do that at U. S. Silica?

A. No, sir.

Q. And I think I may have asked you and I'm sorry if I did, did you know before June 28, 1993 of any pipe running under the industry's track there at U. S. Silica?

A. No, sir, I did not.

* * * *

[Tr. 766, R. 696]

Q. Can you tell us what effect, if any, the surgery – the incident in your opinion – well, let's say since June 28th, 1993, what changes, if any, have occurred to your ability to do those kinds of things.

A. Since '93?

Q. Yes, sir.

[Tr. 767, R. 697] A.I don't do much anymore. I have been to the golf course probably a half of dozen times, I mean, a dozen times and tried to play – it doesn't work.

Q. Do you play eighteen holes?

A. I beg your pardon?

Q. Do you play eighteen holes?

A. Oh, no, sir.

Q. How long has it been since you played golf, if you recall, approximately?

A. Probably a couple of months maybe.

* * * *

[Tr. 769, R. 699]

Q. Now earlier you testified you said something just quickly about the Bridge and Building Department of the railroad, which is a different department from your department, correct?

A. Yes, sir, that's correct.

Q. And the Bridge and Building Department handles such things as bridges and buildings and culverts – we are talking about railroad property, correct?

A. That is correct.

Q. Okay, so there we [sic [were]] no bridges, buildings or culverts out at the U.S. Silica plant that the railroad Bridge and Building Department would have anything to do with.

A. I'm not sure I understand your question.

Q. Okay, the Bridge and Building Department of the railroad is concerned with the railroad's building, the maintenance of the railroad buildings, correct?

A. Yes, sir.

Q. And bridges –

A. Yes, sir.

Q. – that the trains go over?

A. Yes.

Q. Like we see all over the state.

[Tr. 770, R. 700]A. Yes, sir.

Q. And culverts, big culverts, that go under the main line of the railroad.

A. Yes, sir, that's correct.

Q. There weren't any of those types of things out here at U. S. Silica, were there?

A. I don't know that, sir.

Q. But the times you went out there to inspect that track once a month or I think you said twelve times or fourteen times, there were Norfolk Southern bridges or buildings or any of those big culverts for the Bridge and Building Department to be involved with that you saw, were there?

A. That I saw, no, sir.

* * * *

[Tr. 777, R. 707]

Q. Now as you approach the building on the tracks or between the tracks, to your right about ten or fifteen feet there is a line, a four inch line, that runs into the ground. Do you recall ever seeing that on any of your inspections?

A. No, sir.

Q. All right, sir. To your left in the vicinity of the wet processing building do you recall seeing a line come out of the ground and go off into the distance to a tremendous sand pile four hundred yards or so off in the distance?

A. No, sir. I was there to look at the railroad. I wasn't there to look at the pipes.

Q. So you never looked around the area to see what was there?

A. No, sir.

Q. Do you – When I say, let's refer to plaintiff's Exhibit 1 again, the main line is down toward the bottom of plaintiff's Exhibit 1 and this is the building the manufacturing plan on your right?

A. The main line is over here.

Q. But I mean it is going out.

A. Yes, that's right.

Q. And this is back toward the end of the industrial track?

A. That's correct.

Q. And this little road right here is a line that's sitting on top of the ground. If it's a line sitting on top of the ground, it's an eight inch line, did you never see that?

[Tr. 778, R. 708] A. Never really paid attention to it, no.

Q. Didn't pay any attention to it? May have seen it, but you just didn't –

A. Well, I had no reason to look at it, sir.

Q. Okay. Did you have occasion to see lines that ran out here in this direction away from the plant?

A. No, sir.

Q. Did you ever have occasion to look to the left in this photograph off in a distance and see a line running up a sand pile to the top of a cyclone and I mean just a tremendous pile of sand out there?

A. No, sir, can't say as I did.

Q. So your attention then was drawn to just inspecting the track itself?

A. It was my job to inspect the track.

Q. Did you ever give any thought to whether or not the plant was serviced – you knew what this plant did?

A. I really didn't, no.

Q. You did not?

A. No, sir, I did not.

Q. You weren't aware then of what U. S. Silica was in the way of a manufacturing plant?

A. I knew it had something to do with sand. I really didn't know what they did.

Q. Right. Did you have any idea that they had a mine across the road?

A. No, sir, I didn't.

[Tr. 779, R. 709] Q. So you didn't know anything about where they got sand and how they brought it in?

A. No, sir, I didn't.

* * * *

[Testimony of George Foster, Tr. 837, R. 762]

Q. At the time you were there as Plant Manager, were you aware of a requirement that the railroad be notified if the company that is if the industry were going to do pipe work under the tracks?

A. Yes.

Q. How did you know of that requirement of the railroad on the company?

A. I was told that by the man that preceded me.

Q. That preceded you in what capacity?

A. As the Plant Manager.

Q. And what was his name?

A. John Mitchner.

Q. Do you know where he works today?

A. No, sir.

Q. Do you know where he went after you succeeded him?

A. He went to the corporate office as the General Manager.

Q. In Berkeley Springs, West Virginia?

A. Berkeley Springs, West Virginia.

Q. All right, do you also know of a requirement that pipes going under industry tracks be encased?

- [Tr. 838, R. 763] A. Yes.

Q. And whose requirement was that?

A. Industry standards.

Q. What is the source of that requirement? Was that a Pennsylvania Glass Sand Company rule or was that a railroad rule or some other rule?

A. It would be a railroad rule.

Q. All right, sir. How did you learn of the railroad having the rule that required pipes going under the tracks to be encased?

A. Knowledge from the plants in Texas.

Q. The plants in Texas –

Mr. Boston: Your honor, I object and ask that the testimony be stricken if it has to do with knowledge he gained from requirements of separate railroads or plants in Texas. It has nothing to do with the plant in South Carolina.

The Court: Well, hasn't there been testimony that these are national standards, Mr. Boston? I overrule your objection.

Q. So let me get this straight. You got that information from working at the company, is that correct?

A. Yes, sir.

Q. Now on the requirement of the encasements of pipes did you ever have any conversations about that requirement with anybody in Berkeley Springs, West Virginia?

A. John Mitchner.

Mr. Boston: Your Honor, I am going to object to any conversation as being purely hearsay.

[Tr. 839, R. 764] The Court: Was Mr. Mitchner an employee of the company, of U.S. Silica, Mr. Boston?

Mr. Boston: Yes, your Honor.

The Court: All right, thank you. I overrule the objection.

Q. So that information you learned from Mr. John Mitchner?

A. Yes, sir.

* * * *

[Testimony of C.A. Smith, Tr. 869, R. 794]

Q. Were you aware – excuse me – did anyone from U. S. Silica inform you on the day that you went out there or any time before that a pipe had burst, a water pipe or slurry pipe had burst, under the track on Saturday the 26th of June?

A. No, sir.

Q. Did anybody tell you when you went out there or before that, in fact, either the same slurry pipe or another slurry pipe had burst on June 28th, the day that Mr. Rogers went out there?

[Tr. 870, R. 795] A. No, they didn't.

Q. Did you know that there were high pressure slurry pipes running underneath that track?

A. No.

* * * *

[Tr. 875, R. 800]

Q. Are you aware of any other incident at U. S. Silica involving any holes underneath their track before or since – excuse me, before?

[Tr. 876, R. 801] A. Before June of '93?

Q. Yes, sir.

A. No, sir.

* * * *

[Tr. 878, R. 803]

Q. And to your knowledge you haven't found a problem with a rupture in a pipe or a hole under the tracks at any time before the incident on June 28, 1993?

A. Not to my knowledge.

* * * *

[Closing argument, Tr. 1031, R. 953]

[The Court:] Madam Forelady, ladies and gentlemen, I would caution you the closing arguments of counsel are not evidence and should not be considered by you as evidence in this case whatsoever. However, the closing arguments of counsel are an important stage in the proceeding and I would ask that you please give them your close attention. Thank you very much.

Mr. Tucker: May it please the Court?

Ladies and gentlemen of the jury, thank you for your patience. As the judge told you, it is now time for us to make our closing arguments. I promise you I will try to be brief.

As counsel for Mr. Rogers, it is our duty to present the facts to you for you to make a decision. You will make this decision based upon the facts about Dave Rogers' future. The judge will instruct you about the law and you will go back and you will return a verdict. What you are about to do is part of the great service that we as citizens are occasionally called upon to render. This nation was founded on the principle that a person is entitled to a jury of his peers in a decision such as this. And why are we here? We are here because in the United States all people are equal before the law and we do not settle our disputes on the street like they do in some places or behind closed doors. We do it before a jury of our peers with a judge and with lawyers and with rules and with civility and it makes our society work better. And what you are here to do makes you a part of that great system that so many of our forefathers and forebearers fought for and [Tr. 1032, R. 954] died for. It's a very solemn duty and we appreciate your doing it. Every time you walk down the street or drive up and down that street and you look up here at this courtroom, I hope that you will feel good about doing what you are doing now because what you are doing makes you even more a citizen of this country than perhaps you were or felt like you were when you walked in here and you will go out of here and feel good about what you have done and we thank you for that.

What I will do is try to tell you what we think is important about this case and before I do that I know that on behalf of my cocounsel, John Hall and Bob McKenzie, and on behalf of Dave and Kathy and their family we want to thank you personally for what you have done and the hard work that you have put into this case because it is hard work. We have been sitting on those same kind of chairs and we understand, believe me, we understand.

The Judge will give you the law and what I tell you about the law I am not trying to take his job away, but we will

comment on it and try to help you focus and see where we are going and we will talk about the facts.

Early in the trial you heard some opening statements and you hadn't heard any of the evidence yet. At that time that opening statement was sort of like a jig-saw puzzle and we tried to tell you what the box looks like, the cover, so you would know sort of where we were headed. Then the pieces of evidence come in from the stand and depositions and photographs, all one at a time, and they form a picture [Tr. 1033, R. 955] puzzle and you were going to have to put them together and now we are going to talk again about we find at the end of this process.

We are here to consider what happened to Dave Rogers on June 28, 1993, and what happened to him and his wife on that date because on that date he had a very tragic event happen. He was at work for Norfolk Southern and he was called upon to do his job and go out to the facility at U. S. Silica and inspect something that he was told was a hole or something, an occurrence. And that's all he knew. And you have seen this probably so many times you wish you would never see it again. But that's it. Dave had been with them for about nineteen and a half years. He had been a good, faithful employee, had done his job, done everything they asked him to do. He had had promotions and he had a career that was going to provide him and his family with a safe and secure future. And on June 28, 1993, it got ripped right out from him. And instead he is left with a life of pain and suffering and the job that he loved so much, if you don't know anything else about Dave Rogers, I think you know he loved what he did. He was content with that. How lucky is a man who can have a job like that that he loved because it's not like Doctor Stewart described as work, for Dave he loved it. He had that taken away from him and he had it taken away from him for no good reason by two different corporations because of what they did and because of what they didn't do and it was so simple.

There are some things about this case that you have heard about claims of it being open and obvious, open and obvious. What is open and obvious about this case is that Dave Rogers was doing what he was [Tr. 1034, R. 956] told to do the best way he could and the way he was trained when he walked out along that track to look down in there to see as he was required to do as Mr. Cody said, as Mr. Dunn said, what's under the hole, what's in the bottom, what caused it and what has to be done to fix it. And, you know, that's Norfolk Southern's job and that's Dave's job for Norfolk Southern, but do you know who benefited from it as much or more than Norfolk Southern? U. S. Silica because they had to have their cars switched out of their plant like Mr. Holmes told you all or they don't operate. And if they don't ship sand, they can't make any money. They can't make a profit. And he was doing was for them too.

So he comes onto their property to look at that hole. When he goes onto that property on behalf of Norfolk Southern, Dave carries with him something that you need to remember, that is, you know, the train goes by when I say that, Dave carries with him the right to a safe place to work and the judge will tell you that Norfolk Southern because it is a railroad that Dave is covered by a special federal law, which applies to railroad employees, and which says that every employee of that railroad is guaranteed is supposed to have, the railroad is required to give him a reasonably safe place to work and reasonably safe and suitable tools and equipment. They are supposed to take care of him and have a safe place to work for him wherever he goes. And that duty, that entitlement to that right is Dave Rogers' and every other railroad employee takes with him is known to the railroad and has been known to them since they put two rails together to form this after the statute got passed and they knew it and they have known it for the whole thirty [Tr. 1035, R. 957] something years that they knew they didn't have a side track agreement with U. S. Silica. So when it goes out there, the

law says that he has a right to expect a safe place to work and they have to give him that and they didn't do it because on that date you have heard the evidence from their own Division Engineer, Mr. Cody, who told you that if U. S. Silica put an uncased pipe under that track, that was an unsafe condition. And, ladies and gentlemen, on that basis right there we submit to you that you should return a verdict against Norfolk Southern and on behalf of Dave Rogers.

The other thing that is open and obvious to you is that Dave Rogers was doing the best he could and that he was a good man. You saw him. You are going to judge the demeanor, the character and the credibility of each witness that appeared before you. And you are going to look at them and decide is that witness telling the truth, is he trying to be honest with me and I think if you think back in your mind about Dave Rogers, then you will know that he was and you'll know that Pete Coleman was and Tony Samuels was and they told you what happened out there and it didn't have to happen. It shouldn't have happened, but it did. And you will also remember, it's very apparent, that Dave when he was going out there and he went to look at that track, he approached it in a way the best way that he knew how, the way Mr. Coleman said he should do it, the way Mr. Dunn said he should do it and there may have been others that said that. We had a lot of people say a lot of things. He went out along that track because that was the safest place to be. And it's not like it's just an open Grand Canyon. It's not that way. It's in sandy [Tr. 1036, R. 958] ground and it's only a little bigger, wider, than the variations of all of the cross ties that are there, like venetian blinds, so you have got to get out there close. Remember this, he was asked the question when you went out there if you had known that there was a water pipe busted under there, he was asked would you have approached it in a different way. Remember that. That was a question. Would you have approached it in a different way. No, sir, that's the only approach. That's the safest approach. And also

remember this at the time that he went out there, U. S. Silica's own plant manager, Mr. Holmes, Mr. Burke the mechanic said that it should have been taped off and I think it was Mr. Burke this morning or perhaps Mr. Hammer, excuse me, Mr. Hammer who said that if they had a hole and if it wasn't taped off, then that was a violation of U. S. Silica's policy, but it was also a safe place to work that Norfolk Southern did not provide him. And when he went out there along the best way he could, you may later hear that the hole didn't change, well, that's not correct, the hole did change because the ground fell out from under. And if somebody tries to argue with you that his foot sank in the sand, do we really think based upon what you heard from Doctor Owings' deposition and Doctor Alexander and Mr. Groleau and Pete Coleman and Dave himself that the ground fell out from under him and when he tried not to fall in the hole and take care of himself, what happened? It tore his back up. It tore his back up. That's what happened.

And also as to Norfolk Southern, in addition to that, you have heard evidence and questions about side track agreements. We didn't have a side track agreement with Norfolk Southern says U. S. Silica [Tr. 1037, R. 959] and we'll get to them in just a minute. We didn't have a side track agreement, therefore, we don't know anything. That is like an ostrich burying his head in the sand. We don't know anything. We don't see anything. It is not a defense to say we don't know when you refuse to learn. Since 1980 at least the Southern Railway, which was the predecessor of Norfolk Southern, had said we want a side track agreement with you and they wouldn't sign it and you'll have the documents, they've not been read to you yet, but you will have them. This is June 30, 1980 and it sent a side track agreement to Norfolk Southern and they've had it for sixteen years and if Norfolk Southern knew that and they certainly did, they should have gone out there and said U. S. Silica this is real easy, just like we have a right to do, until you sign this

agreement, we don't move your cars and how long do you think that they would have done it? Just about one day in order to get the thing signed and they start pulling their freight and they ship again and that's Norfolk Southern's fault.

You are going to hear all about negligence and all of these words. It's fault, carelessness, recklessness with regard to U. S. Silica. It's negligence. That's a long word. It's fault. They did wrong. They did wrong by not requiring the pipe to be cased. They did wrong by not requiring U. S. Silica to do what everybody knows they should do. With regard to people knowing what they should need to do, you have heard some experts that have come in here like Ron Dunn and Doctor Stewart and Doctor Alexander, Doctor Wolfenbarger. These are experts, people who have expertise. They have knowledge of certain areas of engineering [Tr. 1038, R. 960] and economics and medicine. And why do we bring them here? Because we have the duty to bring these here to you to provide you with the information that you need on that scales of justice to tip that scale just one little millimeter over in Dave Rogers' direction, which is our only burden, and those are the people who can give you the information to allow you to go and return a fair verdict. Ron Dunn is an engineer of many years experience and he told you all about all of those guides and standards and everything else and in the general knowledge in engineering that U. S. Silica had their own plant managers are engineers and those engineering standards say that pipe should have been encased because if that pipe would have been encased, the lines with water would have run all the way out there and U. S. Silica could have taken care of it and the track would never have been in danger.

I would like to read to you from Exhibit number 7. If anybody ever said that they didn't know about putting anything under the track, "Southern is agreeable to permitting for the convenience and accommodation of your company," that's Pennsylvania sand glass, "certain limited or restricted

clearances" and then it goes down "consent to the construction and maintenance that use the facility over, across or under." Under, 1980, sixteen years ago. Sixteen years ago.

You will also see evidence from one of the exhibits that you will be given is a letter where U. S. Silica in 1969 wrote a letter saying "We do not have a side track agreement in Columbia and it is not to our advantage to have one." "Not to our advantage to have one." 1969 they were saying we don't want to have this, that way if anything ever [Tr. 1039, R. 961] happened, we could say we don't know. And I'll say this about Mr. Dunn and about Doctor Thompson and Doctor Bill Stewart if these people thought, and these are good lawyers, they are good lawyers, if you have any doubt in your mind they fault hard for their clients, and I hope you think we have too, do you think that if they thought Ron Dunn was wrong or they thought Bill Stewart was wrong, do you think these companies that have claims departments and medical departments and real estate departments, engineering departments and plants all over the United States, do you think that they wouldn't find an engineer to come in and say that he was wrong? They didn't bring one because they knew they were right.

Now I would like to turn to U. S. Silica. What is U. S. Silica's duty to Dave Rogers? It is not to be negligent, it is not to be careless, it is not to create a situation that could hurt Dave. And what did they do? They had a hole out there. And when did that hole get there? What happened? Why did it happen? What you heard was that it started on Saturday. You have got this pipe and this clamp and you see how thick it is (demonstrating) and they all told you that they send their slurry, that's sand, it's just like sandblasting, it goes through that pipe day after day, hour after hour, however long they operate, and it is wearing it away. It is eating it up. And because it is not cased, they can't turn it, so it's going to wear out on the bottom. Can you see how thick it is? That thing

for it to get to the point where it ruptures it's got to eat through that and they would have you believe, I guess they are saying, they didn't think that it would break again. If they didn't think it would break [Tr. 1040, R. 962] again, why did they already have it scheduled for replacement on Tuesday prior to Dave Rogers being hurt? And why did they wait to have it on Tuesday? Because they had to rent a Nypak machine in Atlanta and they couldn't get it there on Sunday. And why didn't they do it on Monday before Dave Rogers got hurt? Because if they did it on Monday, they knew it would take all day, just like Mr. Burke testified it would, and they knew that if they did that, did not have to pay over time, they knew they had to start early in the morning and they didn't want to miss their switch by Pete Coleman's crew because if they did they couldn't run their mill and they took their chance with Dave Rogers' life for a profit. That's exactly what happened. And that was an eggshell and they told you what was going to happen. They knew what was going to happen. And they said let's get away with it for one more day, we will get these cars pulled, get some new ones in, and then we will replace it after the railroad people are gone. And Dave Rogers has suffered for it and we hope you will compensate him for in according to the law. They put a bandaid on it. They put a bandaid on their pipe and they put Dave Rogers in the hospital for two back operations and they have ruined his life and it isn't right. They said they didn't know it was going to break, yet they keep these things on hand because they have so many breaks. They have got a Nypak machine now they told you about because they have to do it so often. That's what they did. And they want to come in now and say oh, we didn't know we didn't have a side track agreement. They've known that since 1969. They said we don't have a side track agreement. We don't know anything. Up in Berkeley Springs, West Virginia, where you will see [Tr. 1041, R. 963] that letter came from in 1969, it says, yes, we don't have a side track agreement and we don't want one because it isn't to our advantage and they didn't get

one and this happened to Dave Rogers, a man that everyone in here has testified that he is honest and was doing the best that he could. And he approached the hole the best way he could to do his job the way he understood it and he got terribly injured, terribly injured. He did the absolute best that he could.

Even if the rules didn't exist that they say they didn't know about and they weren't applicable, they didn't apply to them, general engineering would tell them that. Is it conceivable, is it conceivable that a company with engineers as its plant manager and working miles and miles of pipes like they do and carrying all the amounts of water and tremendous amounts of sand don't know that it would be safer to have a pipe encased? Is that even possible that they could come to this court and say we refuse to know, therefore, we don't owe Dave Rogers. That's not right and I hope that you will find that it's not right.

You heard two witnesses who said they saw the hole on Monday morning in prior testimony come into this courtroom and say, oh, I'm sorry, now that I've had a chance to think about it I don't think it happened on Monday morning. I am going to tell you what it appears happened based upon the evidence. What happened was that on Saturday that eggshell pipe, by the way remember that when they replaced it, they didn't replace this much, they replaced 140 feet, it took a couple of hours they said and they have all of this and all they are trying to do is please, please, let us move it a little bit away from that flour track, so we can [Tr. 1042, R. 964] argue that it didn't happen, but when they later replaced it, they repaced the whole 140 feet and under two tracks in eight hours, maybe it was eight hours, you will remember. And on Monday they replaced that, in fact, they put that band on it to repair it and they couldn't replace it then. Do you know why? Because remember what they said if they couldn't operate that line when they needed to, the whole mill shut down. And Mr. Burke or whoever it was out there the operations people

said, oh, no, we can't replace that pipe this weekend maybe because they have to get the Nypak machine, but for whatever reason, we can't replace that pipe and the main reason is because tomorrow we have got to operate that line for five or six hours and we'll have to shut down and we can't operate, so we don't want to replace that pipe, plus we don't want to call people in on overtime either. So they schedule it out for Tuesday and they leave the hole out there. Why did they leave the hole out there, why, because they don't have to spend the time digging it up on Tuesday. And on Monday morning Mr. Holmes – I mean Mr. Hammer comes out there and Mr. – I can't think of the other one – whatever the gentleman's name and on Monday they go out and they say, oh, my, a hole, got a tape around it, and they want to tell you it is over here. Were there two holes out there so big that one of them required a safety tape? No records about that, of course. A tape around it? That's interesting. Did they tape their own holes that their employees may get near, but as far as Mr. Rogers and Tony Samuels and Pete Coleman, they don't tape that one. Is that right? And that's what happened. And when the production people like Mr. Hammer saw it on Monday they said this will never do. We have to get this [Tr. 1043, R. 965] thing back into service so the train can switch us in a couple of hours. And they covered it back again and they were running fresh water through it, it bowed this pipe out, it exploded, it burst, washed the ground away and when Lopez is called by Pete Coleman, he goes out and even then he refused to admit that, he didn't tell anybody what had happened. You have heard medical testimony about his two back surgeries. Yes, he did have prior back injuries and I won't go into all of that, he did, no question. And you have heard since the time this case started and it has just been one after another that he had restrictions. He did have restrictions. He went back to work with restrictions just like Mr. Cody said and he was working fine within his restrictions. He had to have two surgeries. He was doing fine. And what happened? He's got pain instantly when it happened, his back

popped loud enough for a man standing nearby to hear it. His back popped. Pain shoots down his left leg like Doctor Alexander told you. What this means is this. The pain is now on his left side, not his right side. That's a new injury. Doctor Owings said "The last one that was – the last operation would be the fourth. Do you have a way to state based on history and your knowledge of what would be the precipitating factor? No, I don't. Since he was under treatment all the time, never seemed to get well, I would assume probably that was there initially even though it was not picked up – it was there initially even though it was not picked up on the MRI or maybe it was not as maybe it increased in amount as time went on, but he never really got all right after that injury." You gave him a whole body disability after the '89 surgery? I did. What was that? Fifteen percent. What is his whole body [Tr. 1044, R. 966] disability now at the end of his fourth operation that you've given? The last time I rated him I said at that particular point I thought he had a thirty percent whole body permanent physical impairment. So it doubled basically? At that time that's what I thought. What is the difference as to what Mr. Rogers can, in fact, do in the way of work today in your medical opinion from the work he could have done in '89? I think there is difference he could and should. Yes. I think today he can't whereas in '89 he shouldn't." And you've already heard in 1989 he didn't do that job, he did a lighter. And you heard Doctor Alexander explain to you that there was pain down the left leg that was right there as soon as he got hurt. That's a hole or log out in the snow and you see rabbit tracks leading up to it, but there's no rabbit tracks leading out on the other side, so you know the rabbit is in the hole and when the left leg pain went away, you know they finally found the real cause of his original leg pain which happened when the ground gave way like Doctor Alexander told you. I guess U. S. Silica lawyers and the railroad lawyers would argue that they can't see the rabbit running in circles

running away, but that's what it was. That's exactly what it was.

I am going to go through quickly with you what Dave Rogers' damages are and here they are. He has a life expectancy of 34.96 years work life. If he's able to keep his job $355,000. If he can only have minimum wage, this is today's dollars, $602,000. If no other job eight thirty-two. His loss of fringe benefits is $347,311. Their own witness, Doctor Wolfenbarger, said that his present job is without fringe benefits it was three hundred and ninety-one. Doctor Stewart talked to you about loss of enjoyment [Tr. 1045, R. 967] of life each year of his life $40,000. His medical charges is thirty-one. If you total these up, his total economic losses taken from this chart seven hundred and two, four seventy-two, minimum wage nine hundred and fifty thousand dollars. Without his job one million one hundred seventy-nine thousand five thirteen. Doctor Wolfenbarger figures of his economic loss and add his fringe benefit loss that we have already talked about, that would be seven thirty-nine. His medical is thirty-one thousand. The loss of enjoyment of life thirty-four, thirty-five years times forty thousand dollars three sixty and that does not include any figure for pain and suffering that you know he has had after his accident when he was laying in bed handing over his keys to the company property. This man who you know is a strong man and a good man his employer saw tears coming out of his eyes he was hurting so bad. His life is ruined. The future that he and his wife had with his career at the railroad it was ripped from his hand and he is reduced to this point today. Ladies and gentlemen, these figures you can add them up. It's up to you. We leave that in your hands and suggest to you that this methodology you add these together and these combinations would yield a figure which you can feel good about when you leave this courtroom and give to Dave Rogers.

On Dave's behalf we thank you. We will talk with you again in just a few minutes and we appreciate your attention. Thank you.

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[Closing argument, Tr. 1063, R. 985]

Mr. McKenzie: Madam Forelady, ladies and gentlemen, I will try to brief. I know you have been sitting there for a long time, but I generally tell every jury that I argue to that I probably won't be as brief or as efficient as you want me to be and I apologize for that. One reason is that we have to sit here and look at twelve people we don't know and we have to try to anticipate everything you are thinking about, so we may have been arguing about things that haven't been bothering you about this case and if we have, I apologize on behalf of all the lawyers. We appreciate your attention. We thank you for being here and I am the last speech to be made. My voice is still bad and I may have to stop earlier and you may clap when that happens and I may have done that to Mr. Boston, which cut some more time out of this, but anyway things happened and I am going to try to get through as quickly as I can.

Now let me tell you this or let me ask you this. Have you heard any testimony that Dave Rogers fell in a hole? Did he fall in a hole? No. Have you heard any testimony that Dave Rogers hurt his back lifting something heavy? No. Have you heard that he hurt his back bending over repeatedly or that he hurt his back because he sat down for long periods of time? No. You see, all of these things that they have been talking about that could have happened didn't happen. We are here for another reason. They can say that he had restrictions placed on him or what he had to do after those first two back injuries and his back surgeries and they're just trying to get you to think that that could have happened somewhere down the line, but, you see, it didn't. It's not relevant. It's not what's important in this particular case. He didn't hurt [Tr.

1064, R. 986] his back because he didn't follow his doctor's orders. He hurt his back because U. S. Silica Company and the Norfolk Southern Railway put him in a position, did not protect him, and hurt him out there on that job that day and when they did it, they put him in such a condition that he could not do the job that he wanted to do anymore. They stopped it right there on that day. There was no chance that he was going to hurt himself lifting something heavy. There was no chance that he was going to hurt himself bending or sitting or doing something like that. They didn't give him a chance if he was going to work carefully and that was going to happen, they stopped it because they didn't take care of him, they didn't protect him.

Now, U. S. Silica says there's a hole out there, you know, it's open and obvious, forget that we didn't put it out there, that's not important. I suggest to you, ladies and gentlemen, it is important. It's very important that they put the hole out there because they did it over a period of time and they could have stopped it. They knew on Saturday they had a problem, they didn't fix it, they could have stopped everything right there, they could have plugged that line, put a new line in and that could have been the end of it. No more story here about this case. But that didn't happen. You know, and they say it's open and it's obvious. Well, there's a hole out there that people can see, it's covered over by cross ties and it's covered over by railroad tracks, you know, and you have got to get up close to see it. Nobody knows how deep it is. Nobody knows unless you have some x-ray vision or something that it was washed out and concave instead of washed in when you have something going [Tr. 1065, R. 987] across surface water washing it out. Didn't know that. Dave Rogers didn't know it. You know, it wasn't obvious. You know, and there's still water running in the bottom of it and they want to say it wasn't changing. That water is washing, it's washing it the hole time, you know, and I think it's important people up here in Fairfield County there are a lot of fish ponds around, you

know, and if a fish pond freezes over and you want to step out it, if you step out on it with your foot, you know, you can go through the hole because you have a lot of weight on a small place. But do you remember, ladies and gentlemen, when Tony Samuels testified? Do you remember what he said, the engineer? Do you remember him telling you about the piece of tin, a piece of tin that people from U.S. Silica brought out there and put out there because, you see, when something like that if you want to spread that weight out, you take a piece of plyboard or you take a piece of tin and you put it down on the ground and you get out on it and it spreads that weight out and you don't go through. You see, they're out there with a piece of tin looking at the hole and then they leave and they take the piece of tin with them and they don't put up that yellow and black ribbon that they put around the other hole. They know Dave is coming. They know that they have got the train stopped. They know that he's on his way out there. And they want to come in here and say we didn't do anything, it was open and obvious, he just came up to it and all of a sudden, you know, the ground gave way under him, it's his fault, it's his fault. I submit to you, ladies and gentlemen, that that is not something that you are going to swallow. It was not his fault, none of it, none of it. He made a judgment. He had to get [Tr. 1066, R. 988] out there and he had to do his job. He had to look in the hole. He had to find out what caused it. He had to protect his employer's equipment, but more importantly, he had to protect the other people that worked there. He was protecting Mr. Samuels. He was protecting Mr. Coleman. He was protecting the people and the equipment of Norfolk Southern Railway and he did a good job. Everybody that testified said he did his job well from the top boss right down to Mr. Coleman and Mr. Samuels too, honest, hardworking, makes his reports on time, does good work. Hurts his back, they put him back to work. Hurts his back again, they put him back to work. They want him there. But, you know, it became a different situation when he hurt it to the point he couldn't go back to

work. Then you've got the railroad in here saying, oh, my goodness, you know, ladies and gentlemen, U. S. Silica caused this. You see the railroad's got a problem. They've got a problem because they had put him out in a situation that they could have prevented as well. They could have required that pipe to be encased. They could have required that industry to comply with all of those standards, but they didn't do it. They knew they didn't do it. They are writing letters in 1980 saying we want you to sign this agreement. You will have those letters when you go back in the jury room. They didn't make that industry comply with its own standards and they come in here and say it's the industry's fault totally. Don't bring back a verdict against the railroad because they caused the hole. Mr. McMaster gets up and says – does he admit anything? What happened on that day? Well, you see, if you just look at that day, I guess Mr. McMaster has got an argument because on that day the hole appeared because of [Tr. 1067, R. 989] what U. S. Silica did. But, you see, years and years the railroad didn't do what it was supposed to do and whereas Dave Rogers was protecting their equipment and whereas Dave Rogers was protecting his co-employees, the railroad wasn't looking after Dave Rogers. You see, Dave Rogers was the inspector of the track, but he didn't inspect the pipe. That wasn't his job. The railroad had another department that came out there and was supposed to look to see if the pipes were under the track and if the pipes were cased and if the pipes were proper there, but they didn't do that. Was there any testimony that they had somebody out there?

The Court: All right, just a moment, just a moment. Objection?

Mr. Henry McMaster: We object. Mr. McKenzie has gone outside of the record.

The Court: All right, please just keep your summation confined to the facts in evidence.

Mr. McKenzie: I did. It's my recollection of the testimony and you have to remember what the testimony is, it is my recollection of the testimony that the testimony was that the pipes were inspected by the bridge department, not by the track department. You, ladies and gentlemen will remember, and if I went outside the record, then that would be wrong, but I suggest to you that you will remember that testimony.

Now, you have got the railroad, they are saying blame Silica. We have got Silica saying blame the railroad. We submit to you that in different ways each one of them is just as responsible as the other [Tr. 1068, R. 990] and you really can't tell the difference. The railroad has an obligation to provide this man with a safe place to work, a safe place to work, and the railroad didn't do it. And I know when you sit there and think about it, the active things, the bad things that happened on that day U. S. Silica did and we agree a hundred percent with the railroad on that. But we do not agree with the railroad that they didn't do anything or maybe we do. They didn't do anything and that's what caused Silica to be able to do what they did. Had the railroad done what they were supposed to do, this never would have happened.

Now the railroad comes in and hires a gentleman, Doctor Wolfenbarger, and-they really don't want to pay any money. They have got a zero up there. But judge to hedge their best, they say, you know, ladies and gentlemen, if you really think we did something wrong, if you really think we ought to pay or make us pay, we don't like the figures that the plaintiff has. We have got our own figures. That figure $391,702, that's the railroad's figure. Now when Mr. McMaster tells you what that figure is, he sort of apologizes and he says, you know, that's what our witness that we paid our money to figured up for us, but, ladies and gentlemen, you don't even have to use that, you see, because this man had a hurt back. If he had kept on, you know, he would have lifted something heavy or bent over too many tines or he would have sat down for too long and he'd blown his back out anyway, so just

forget all of that. But, you see, he was working every day. He worked for four years and he did a good job and, really, this is a figure where you all start, the railroad's figure. This is their bottom figure. You know and the thing about it, as Mr. [Tr. 1069, R. 991] Tucker pointed out to you, that figure doesn't include his fringe benefit figure, which Doctor Thompson said was $347,311. Well, if you just add those two things together, you're up with what he lost from the railroad. Now those are their figures. And you sit there and say, my word, what kind of money are you talking about? But, you see, ladies and gentlemen, it doesn't take long to figure this thing out because if somebody could work thirty years and if you didn't make but $10,000 a year and you stopped him from making $10,000 a year, that's $340,000. You've got to reduce it to present value, but you are talking big figures because it's a life time, it's a long time and there is no question that everybody agrees that this man can't do the job that he had with the railroad. He was lucky to have that job. He knew he was lucky. He liked that job. He wanted to keep it. He wanted to go back to it after this last accident because it's a good job and it's something that everybody wants to hold onto when they have one, you know, and it's been taken from him.

Now I'm about through and you are probably saying, well, thank the Lord you can sit down, but let me tell you some things here that I want to point out. Mr. Ott is talking about Doctor Owings and we didn't bring him up here. We went down and took his deposition and asked these questions. That's perfectly an acceptable way to do it. And Doctor Owings, doctors are busy, and they charge money too. The doctor that testified he charged $250 an hour. Somebody has got to pay that. If you go to their office and you do a booklet like this, question and answer form, it doesn't cost you as much money. Doctors sometimes have problems, they can't be here, but anyway we have got a booklet. He wants to say we [Tr. 1070, R. 992] did something wrong because we took

a deposition? Why didn't he subpoena the doctor and bring him up here himself and let him testify. He did the best he could. Did you hear any medical testimony that we didn't put up? No, you didn't, no. Let's talk about that. Mr. Tucker meant to read this to you and I had marked it in this book for him and he couldn't find where I marked it, so let me cover this. You heard our friend from Charlotte get up here and tell you that all the symptoms of this man were in his left leg and that after they had the operation that the symptoms were gone from the left leg. And he said that's why I attribute this second operation to this particular incident because he continued to have left leg pain. Let's hear what Doctor Owings had to say about it. This is the question I asked him. "But from the standpoint of the symptomatology of the symptoms with the left leg pain is there any time from July of '93 through the fourth operation – " and his answer, "that it totally went away?" Question: "Yes, sir." Answer: "No." And my question was this: "After that fourth operation, what happened to the symptom of the pain in his left leg?" And his answer says, "He said it went away, he felt a lot better." You see, he never had any problem in his left leg until this incident. And they did the first operation and it didn't go away. They did the second operation and it did go away. You see, so it's easy, it's easy to conclude, as Doctor Alexander did, that it was caused by this particular incident. And it's really easy to think why Doctor Owings might hedge on this, because as Mr. Tucker read to you, he said, you know, look, I don't know if it was there to begin with and we missed it or where it just got larger, you know. He didn't pick it up. He didn't pick it up initially and [Tr. 1071, R. 993] that put a question in his mind. He doesn't want to say I did something wrong. But he said the symptoms were there, they operated the first time and they were still there. They operated the second time on that other level and it went away. You know, this man has had two operations on his back as a result of this thing. And of those medical figures we don't have in this the $31,000, almost $32,000, of medical expenses

that you have got there, look at those bills and you will see that of that figure we didn't even have a bill for the operation that took place in July of 1993. That's not even claimed in there because we didn't have it put in evidence. That's our fault. But, you see, the medical expenses are greater than we are claiming.

Mr. Ott: Your Honor, I have to object. He is arguing about things he didn't put in evidence for the jury to consider in their deliberations.

The Court: All right, I am going to sustain that objection.

Mr. McKenzie: And the other thing is this: you know, somebody gets hurt, you hear about somebody a friend or a family member or something in an accident, you don't call them up, you heard they're in the hospital and you say, heard Dave got hurt, you know, I bet he's going to miss a bunch of time from work, boy, I bet he's going to have to have somebody up there looking after him and those kind of things, you know. You don't ask about that when somebody gets hurt, hear about them in the hospital. What did he ask? I hear Dave's been hurt. Is he comfortable? Did they give him something to take his pain away? You see, that is the real, one of the real, elements of damage that nobody has [Tr. 1072, R. 994] talked about. The hurt, the hurt physically, and he has had plenty of that, but the other thing is the hurt emotionally. The man was out there supporting his family, had a good job and everything, being able to sit his daughter in his lap, things of that nature, that's gone. That's the sad part. Those are the things that really hurt and that hurt doesn't go away. That hurt stays with you. So, you see, you have got all of those things to think about. But the only thing you have got to worry about really and I tell this to almost every jury that I argue to, you don't have to please me, you don't have to please Mr. McMaster, you don't have to please Mr. Boston, Mr. Ott, Mr. Tucker, or Mr. Hall. You don't have to please the Judge. The only person you have got to worry about pleasing in this jury verdict is the person that you

look at in the mirror in the morning and if you can please that person and if you can get eleven more people to agree with you, then you have done your job as a juror. This is something that you ought to look forward to. I'm sure that once you get through with this one, you'll say maybe no more, but, you know, jury service is really a civic duty that should mean something to you. When you get through with this case, it ought to make you feel good. It ought to make you feel great. You ought to want to come out of the jury room and shout your verdict out because you have done what you think is right in this particular case. And, ladies and gentlemen, what they want you to do talking about assigning some fault to Dave Rogers is to try to get once you go in and decide what his damages are, they are going to apply a reduction figure if you were to find he was at fault and they will reduce his verdict by that percentage, you see? They are trying [Tr. 1073, R. 995] they say he's not hurt, but if he is hurt, you know, he caused it and you ought to reduce it or we're not at fault or the railroad's at fault, U. S. Silica's at fault. They are trying every way they can to detract from Dave and the fact that he's the one that's hurt. You see and to make the math easy, if you find that Dave was not negligent, that he approached that hole the same way that he would have approached it whether it was there because of a washout or because a pipe bursts and that is because when you walk down the track you have got structure under your feet and you got close to it and if you inch up to it and get as close so that you can stop what's going on and make it safe for your people, he did what any other person would have done under the circumstances. Any reasonable person would have done the same thing.

Now if he had known that they were out there with a piece of tin or that it was blown out by a pipe that was concave and that it might fall out under him, you know, he could see one side, but he couldn't see the one that was concave, it might have made a difference, but, you see, you have got to go by

what he knew. So do what's right, do what you think is right in this case that you can agree on. And, ladies and gentlemen, we say, as I said in my opening statement, you are going to have to protect Dave Rogers because his employer didn't, U. S. Silica sure didn't and there is nobody else left to do it. Do what's right. Bring back a verdict that makes Dave Rogers whole and that's all we are asking. We don't want you to give him anything he is not entitled to, but make sure that you give him everything in which he is entitled because there is no tomorrow, it's today. This is it. This is his only day in court. You can't [Tr. 1074, R. 996] come back and say I wish I had done something else. It's too late. Do what's right. Thank you very much.

The Court: Madam Forelady, ladies and gentlemen, you have been sitting for over an hour and a half. I am going to allow you to retire to your jury room. Do not discuss the case. When you return, I am going to charge and instruct you on the law. You will be here a little while. Try to refresh yourselves and make yourselves comfortable. After we have completed that, you will retire and then you can discuss your verdict. Thank you. Please retire.

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No. 03-1259

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IN THE
Supreme Court of the United States

JOHN DAVID ROGERS,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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Shenker v. Baltimore & Ohio Railroad, 374 U.S. 1 (1963), holds that a jury may find a railroad liable for damages under the FELA if the railroad fails to "inspect" the third-party premises where its employees work. *Id.* at 8. The *Shenker* rule applies *regardless* of whether the railroad had control over the property or prior knowledge of the particular danger that caused injury. Indeed, in *Shenker*, the Court noted that the third party's railcar that injured the plaintiff "had just pulled into the station," so that the railroad could not have known in advance of the defect in that car. *Id.* at 7.

Respondent NS concedes that it failed to undertake *any* inspection of U.S. Silica's premises for pipes that ran under the rail tracks, but asserts that its failure is legally irrelevant. *See* Opp. 8. The state supreme court erroneously agreed, overturning the verdict of a properly instructed jury on the ground that NS could not be "omniscient" as to latent dangers on U.S. Silica's premises. Pet. App. 7a. Under that ruling, a railroad has no duty to inspect to *discover* latent dangers, but is responsible for addressing only those risks of which it is actually aware.

That holding is squarely contrary to *Shenker*, as well as the multiple federal circuit courts and state supreme courts that have read *Shenker* as requiring inspection of all areas where the railroad employees are directed to work to discover whether there are dangers that might harm those employees. Under *Shenker*, it is not enough to say that the railroad did not know of a danger. Accordingly, if this case had arisen in the numerous courts that have applied *Shenker* in third-party premises cases, the jury's verdict would have been affirmed. *See* Pet. 12-15. The dangerous condition here was plainly on property NS "required" Rogers to "use" (Opp. 18) – Rogers was sent to inspect the hole, and he was injured at the edge of that hole because of the dangerous condition that NS never discovered. *Shenker* requires nothing more to impose liability. The decisions that have followed *Shenker* cannot

be reconciled with the decision below (and *Seaboard System Railroad v. Coffee*, 565 So. 2d 35 (Ala. 1990)).

In opposing certiorari, NS flatly misstates the holdings of *Shenker* and the cases that have applied it in third-party roadbed hazard and property cases. NS avoids addressing the proper and unobjected-to jury charge, which required the jury to decide that NS "knew" or "should have known" of the dangerous condition before exposing Rogers to it. And NS ignores the evidence *supporting* the jury verdict (preferring instead a recitation of *its* evidence that the jury soundly rejected).

Given that the law is so clearly against its position, NS's Opposition fires a lot of shots with loud bangs as to the factual record, but they turn out to be blanks. NS presents a legally untenable waiver claim, and it posits a self-serving version of the facts that is not only irrelevant – because NS does not dispute that it never inspected the premises for pipes that caused Rogers' injury – but also contrary to facts that were credited by both the jury and the trial judge that actually heard the evidence. Ultimately, it matters greatly that the South Carolina Supreme Court diverged from this Court's precedents and the decisions of other courts on a legal issue of monumental importance to hundreds of thousands of rail workers: whether the FELA imposes on the railroad a duty to inspect a third party's premises to ensure a safe workplace where it sends a rail worker.

I. THE OPPOSITION CONFIRMS THAT THE JUDGMENT BELOW IS CONTRARY TO NUMEROUS DECISIONS

a. In *Shenker*, the railroad argued that it could not conceivably have had notice that the third party's railcar was defective "because [the third party's] train had just pulled into the station, [and] the [employer] did not have sufficient opportunity to obtain actual or constructive notice of the [defect]." 374 U.S. at 7-8. This Court rejected the railroad's assertion that it had no duty to inspect, holding that the railroad's duty was either to inspect the

third party's property or to "refus[e] to permit its employees to service" a car not under its control. *Id.* at 10.

NS makes the very same argument here that *Shenker* rejected. Endorsing the state supreme court's claim that NS could not be "omniscient," Pet. App. 7a, NS contends that, because it could not have reasonably known about this danger, it had no duty to inspect U.S. Silica's premises to discover whether any such latent threat existed. *See* Opp. 1 (arguing that the question here is whether "Norfolk Southern knew or should have known" about the pipes). Thus, by its own confusion about the governing FELA standard, NS further demonstrates the judicial conflict that needs resolution by this Court.[1]

Unable to square its position with *Shenker*, NS offers a crabbed view of that decision as applying only to "third-party property that [a railroad] required its employees to use" – and then suggests that it only required its workers to use the U.S. Silica spur track and not the immediately adjacent property around it. Opp. 18.[2] But the unsafe condition here *did* affect the safety of the spur track – indeed, the pipes at issue ran under the tracks, which is why industry standards adopted by NS required them to be cased. *See* Pet. 3-4. And by sending Rogers to inspect the hole, NS just as surely "required" him to "use" the property around that hole as the railroad in *Shenker* did

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[1] Remarkably, NS seems to think that a *legal encyclopedia* on general negligence duties (Opp. 18) is more persuasive authority than *Shenker*, which announces a more stringent standard under the FELA. *See* 374 U.S. at 8. That stricter standard affords added protections to workers in this highly dangerous employment setting. *See* Pet. 8.

[2] NS similarly asserts that, because the underlying facts in this case concern "slurry pipelines," the principle of a non-delegable duty to provide a safe workplace is somehow less relevant. If anything, this Court's guidance is needed all the more because if railroads can ignore their industry standards with impunity – as NS did here – rail workers will be subjected to ever greater threats to their safety. In any event, this case, like those cited in the Petition (at 12-15), involves the general duty to inspect third-party property to ensure railroad employees a safe place to work.

when it required its employee to "use" the other railroad's car that caused his injury. Indeed, NS *concedes* that Rogers was "assigned" by his supervisor to inspect both "the track and the hole underneath it," which necessarily required him to "use" the property around that hole. Opp. 3. NS thus offers no meaningful distinction with *Shenker*.

Even if NS is correct that the decision below rests on a more limited understanding of *Shenker*, that simply underscores the conflict between the decision below and *Seaboard System*, and the lower courts that have *not* so viewed *Shenker*. In *Nivens v. St. Louis Southwestern Railway*, 425 F.2d 114 (1970), the Fifth Circuit held that, having failed to undertake an inspection, the railroad was liable for a defect in the roadbed underneath the tracks, even though that roadbed was designed and controlled by third parties. *See id.* at 120 ("The railroad had a positive duty to inspect and to discover defects from the date it permitted its employees to travel on the roadbed."). Likewise, NS here also had a duty to discover a defect that both was under the tracks *and* affected the part of the property that it required Rogers "to travel on."

Similarly, in *Lockard v. Missouri Pacific Railroad*, 894 F.2d 299 (8th Cir. 1990), the railroad's duty to inspect was found to extend as far as a boarding house where its employees were required to stay and included an obligation to inspect the stairs to that facility to ensure that they would not be icy and unsafe. *See id.* at 303-04 ("[t]he railroad's nondelegable duty [to provide a safe workplace] extends to the property of third parties and includes an obligation to inspect the premises of the third party"); *see also Norfolk & Western Ry. v. Chittum*, 468 S.E.2d 877, 881 (Va. 1996) ("The employer also has a nondelegable duty to inspect its premises and other areas where its employees are required to work and to take reasonable precautions to protect its employees from possible danger.").

Contrary to NS's argument, none of these cases interprets *Shenker* as imposing a duty to inspect only a limited portion of the property on which a railroad directs its

employees to work (here, in NS's view, the spur track, *see* Opp. 18). They all stand for the proposition that the duty to inspect extends to "the entire pertinent premises," Opp. 19 – that is, all areas where employees are directed to go. Likewise, none of those cases views *Shenker* as irrelevant to articulating the railroad's duty simply because that case dealt with another carrier's railcar rather than a third party's real property.

NS's attempt to characterize our argument as leading to absurd results has no merit. *See id.* If NS had an argument that Rogers' injury was not reasonably foreseeable or that the dangerous condition could not have been discovered by reasonable inspection, *see* Opp. 20, it was certainly free to argue that to the jury. *Nivens*, 425 F.2d at 118 ("[T]he plaintiff still has the burden of proving . . . that the employer, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury; foreseeability is an essential ingredient of negligence under the Act.") (quotation marks omitted).

b. Notwithstanding the jury's rejection of its arguments, NS persists in arguing its own version of the facts and ignores evidence the jury reasonably credited. In so doing, it ignores the unobjected-to jury charge, which properly instructed that before the "railroad can be charged with the negligence in failing to provide a reasonably safe place to work plaintiff must prove that the defendant railroad knew or in the exercise of ordinary care *should have known* that an unsafe condition existed." R. 1005 (emphasis added) (App., *infra*, 15a). The trial court later instructed the jury that "it is the duty of the railroad to use ordinary care and prudence in furnishing its employees a reasonably safe place in which to work and to use reasonable precaution to maintain and keep such place in a reasonably safe condition commensurate with the amount of danger which the railroad knew or in the exercise of due care *should have known* existed in the place where its employees work." R. 1008 (emphasis added) (App., *infra*, 15a-16a). NS did not object to those

instructions, R. 1026 (App., *infra*, 16a), which both correctly state the law and properly put before the jury NS's failure to ensure (through proper inspection) that Rogers had a safe place in which to work.

Once the properly instructed jury found liability under the FELA, this Court's precedents preclude overturning that judgment "in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957) (footnote omitted). *See* Pet. 20-21. By changing the FELA negligence standard so that railroads no longer have a duty to inspect third-party premises to discover latent defects that may cause injury or death, the decision below improperly invaded the province of the jury by announcing a legal standard (*viz.*, "omniscience") that departs dramatically from the holdings of this and numerous federal and state courts.

c. The facts amply supported the jury's verdict that NS was negligent. In arguing that "Rogers adduced no facts probative . . . of Norfolk Southern's notice of slurry pipes underneath the track," Opp. 20, NS offers a highly slanted view of the evidence, as though the losing party before the jury is entitled to have this Court draw inferences in *its* favor. But *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946), long ago held that a reviewing court invites reversal by disregarding evidence that supports the jury's verdict.

For instance, NS stridently protests that it could not reasonably have known about the existence of the pipes and accuses Rogers of mischaracterizing the record to suggest otherwise. *See* Opp. 8-10. Its claim is as wrong as it is irresponsible. Testimony demonstrated that the slurry pipes were visible both going into the ground adjacent to the sidetrack and coming out of the ground on the opposite side of the track.[3] NS mocks the use of photo-

[3] Photographs and witness testimony revealed pumping equipment and the beginning of a slurry pipe going underground 20 feet from the

graphic evidence (Opp. 9-10), but the jury – whose role it is to evaluate such arguments – obviously found NS's mischaracterizations inconsistent with the other evidence.

That other evidence included testimony that this was a sand plant with pumping equipment 20 feet from the track in which plastic pipes were obviously used to convey material and that those pipes might run under the tracks. Indeed, in closing argument, Rogers' counsel reminded the jury of Exhibit 7, in which NS had told U.S. Silica that it was "agreeable" "to the construction and maintenance that use the facility [*i.e.*, the track] over, across *or under*." R. 960 (emphasis added) (Resp. Add. 22a-23a). As the trial court understood, a jury could conclude that NS at least had a duty to inquire whether pipes ran under the tracks and, if so, whether such pipes were encased according to industry-standard regulations. *See* Pet. App. 28a.[4]

Indeed, NS here flip-flops from the dispositive concession made by its trial attorney, who conceded that there was evidence from which a jury might determine that NS was negligent in not ensuring that U.S. Silica followed the relevant regulations:

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sidetrack. R. 89-90, 114-15, 1097 (Pet. App. 53a-56a). The 8 and 9 slurry lines were exposed for a distance of approximately one-quarter mile after coming out of the ground on the other side of the track. R. 115, 1097 (Pet. App. 55a). The wet processing center for the slurry operation itself is adjacent to the tracks. R. 129, 1103 (App., *infra*, 2a). The very nature of the facility and the absence of any other apparent means of conveyance across the track were sufficient to put NS on inquiry notice of the use of pipes. R. 1097-1106.

[4] The testimony also showed that Rogers was responsible only for track inspection, and not inspection of areas under which pipelines would have run nearby; that the pipeline would have needed replacing every two years or so; and that Rogers had only been assigned to do track inspections for approximately 18 months. R. 214, 668-69 (App., *infra*, 3a, 9a-11a). From those facts, a jury reasonably could have inferred that someone at NS (other than Rogers) should have been aware of the slurry pipeline, that it posed a latent danger, and that the railroad was negligent in failing to do anything about it. *See* R. 802 (testimony by Rogers' supervisor that pipes and casing requirements were beyond the scope of Rogers' duties) (Pet. App. 67a-68a).

> The Court: They have a duty under the FELA to maintain a safe working place for their employees, don't they?
>
> Mr. McMaster: Yes sir, they do. They do that, but, again, there must be some evidence of negligence.
>
> The Court: Well, isn't there facts in which it could be inferred that they breached their duty to require the codefendant, U.S. Silica, to encase those pipes? There's testimony in the record, isn't there, from which that fact could be inferred? I'm not saying that that's what they will find, but isn't there evidence in the record?
>
> Mr. McMaster: I think Mr. Dunn [plaintiff's expert engineer] said that or something like that.

R. 908 (App., *infra*, 14a).[5]

The railroad's theory here – that the pipeline was built *after* the tracks had been laid, so NS could not have known of its existence – could have persuaded only a comatose jury. Under NS's theory, even though testimony revealed that a NS train services the silica plant three times a week (R. 126 (App., *infra*, 1a)), no rail supervisor noticed that a pipeline was being constructed *underneath the track*. NS's *post-hoc* theories of its evidence are as unpersuasive now as they were to the jury that rejected its case.

Testimony further established that NS had a continuing duty to ensure compliance by a company like U.S. Silica with its regulations (which included encased pipes). Thus, when U.S. Silica did build the track, that continuing obligation required it to inform the railroad of any

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[5] Indeed, Dunn testified without objection that there was ample evidence that the pipe had been replaced numerous times (R. 352-53), that water could create a hole with a cavern effect (R. 359), that NS's actions would be "in violation of its own guidelines" (R. 390), and that the railroad "obviously" would have a duty to know "if a shipper clandestinely or otherwise installed a pipe structure under its operating track" (R. 319). *See* App., *infra*, 6a-9a. The jury could determine NS's negligence wholly independent of U.S. Silica's negligence.

change to subterranean conditions – and NS to ensure that such standards were being met. R. 570 (Pet. App. 62a-63a). But testimony revealed that NS was "not sure" whether it had "a record of any plans and specifications at U.S. Silica." *Id.*

II. THERE HAS BEEN NO WAIVER HERE

NS tries to conjure up a "vehicle" problem by repeatedly asserting that Rogers never argued at trial that NS breached its duty of providing a safe workplace by failing to discover and inspect the unencased slurry pipes. *See* Opp. 22-23. That assertion is both untrue and irrelevant. A court looks at the *evidence* of negligence and not counsel's theories in presenting that evidence. *Lavender*, 327 U.S. at 652-53. NS made that tired argument twice to the state appellate courts, neither of which found it persuasive and both of which addressed Rogers' safe workplace claim. *See* Brief of Respondent at 12-13 (S.C. filed Oct. 31, 2001); Brief of Appellant at 29 (S.C. Ct. App. filed June 29, 1999); Reply Brief of Appellant at 5-6 (S.C. Ct. App. filed June 29, 1999). The standard for whether an issue is properly presented to this Court is whether it was "pressed in or passed on" by the court from which certiorari is sought. *See, e.g., United States v. Wells*, 519 U.S. 482, 488 (1997) (internal quotation marks and brackets omitted). That standard is self-evidently satisfied here. Pet. App. 16a (Rogers "contends Norfolk sent him to an unreasonably unsafe place to work.").

In any event, the closing argument amply demonstrates that Rogers presented a safe workplace theory: "[T]he railroad is required to give him a reasonably safe place to work . . . . [T]hey are supposed to take care of him and have a safe place to work for him wherever he goes. And that duty, that entitlement to that right is Dave Rogers'." R. 956 (Resp. Add. 19a). Counsel further stated that Rogers had the "right to expect a safe place to work," that NS has known about this rule, and that its attempts to shirk its duty and avoid liability by claiming that it had no notice of this problem "is like an ostrich burying his

head in the sand." R. 956, 957, 959 (Resp. Add. 19a-21a). That statement was a direct allusion to testimony that the railroad's engineers had failed to ensure compliance with AREA regulations, Rogers' supervisor was negligent in performing inspection duties, and the railroad workers tasked with pipeline inspection had failed in their duties – all of which had been laid before the jury in direct and cross-examinations. It was also a reference to testimony that the engineer at the scene of Rogers' accident saw the concave cavity before Rogers approached, failed to warn him, acknowledged that Rogers could not have perceived the danger from the angle he approached, and testified that a U.S. Silica employee told him that such cavities had formed before. R. 254-55 (App., *infra*, 4a-6a). Finally, Rogers' counsel argued to the jury that "[i]t is not a defense to say we don't know when you refuse to learn." R. 959 (Resp. Add. 21a).

NS's brazen and self-serving reconstruction of its trial evidence aside, this case presents a straightforward legal error. The state supreme court ruled as a matter of law that a railroad has no duty to inspect a third party's property for latent defects. Numerous federal courts have held that FELA imposes such an obligation on the employer. A properly instructed jury concluded from the evidence that the railroad was negligent, and the state appellate courts applied an erroneous legal standard to invade the province of the jury. On both counts, the decision below smacks head-on into established precedent. Because four decades ago this Court in *Shenker* rejected the very notion that a railroad does not have a duty to inspect a third party's premises where it sends its workers, this Court should either summarily reverse or grant plenary review to determine the scope of *Shenker*'s holding.

* * * * *

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 18, 2004

APPENDIX

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

TRANSCRIPT OF RECORD
(December 2-6, 1996)

Before: The Honorable Paul E. Short, Jr., Judge and a Jury

* * *

[Testimony of James Willard Holmes, Tr. 188, R. 121]

* * *

[Tr. 193, R. 126]

* * *

Q. And did you understand the railroad switched your plant on a regular basis?

A. At that time the standard procedure was to switch Mondays, Wednesdays and Fridays and, you know, if we needed another switch either Tuesday, Thursday or Saturday, that could occur.

* * *

[Tr. 196, R. 129]

Q. How big is the pipe?

A. Eight inch.

Q. An eight inch pipe. What I am getting at is if that eight inch pipe running under that state highway ruptures it couldn't do anything bad to the highway because it's inside a tunnel.

A. That's correct.

Q. All right and then where does that eight inch slurry pipe go?

A. It goes to a raw sand tank which holds maybe two or three hundred tons of material.

Q. And I am going to show you what is marked as Exhibit Number 7, which has been admitted into evidence as Number 7, and ask you if you would tell the ladies and gentlemen of the jury –

A. I have got to have these.

Q. You are doing fine except they can't see.

A. Oh, I'm sorry.

Q. This is the wet process?

A. That is the wet processing building.

Q. Now there's a marker on here, is that the eight inch pipe that runs under the state highway?

A. Yes, it is.

Q. And runs across the top of the ground here?

A. Yes, it does.

* * *

[Testimony of William Brown (By Deposition), Tr. 277, R. 210]

* * *

[Tr. 281, R. 214]

Q. And this pipe, this four inch polyurethane pipe, it had broken before and caused holes in it?

A. Yes, sir.

Q. And this happens on a fairly – and I don't mean every day, but I mean on a fairly regular basis, it's something you know is going to happen?

Mr. Tucker: Line 5

A. Well, are you just specifically talking about the 8 and 9 line or . . .

Q. Yes, the polyurethane pipe.

A. No, sir, it's a pretty durable pipe. And this pipe that we're talking about now has probably been in there since a year and a half. I don't think we've replaced it since then.

Q. Would you say that it fractures then maybe every year and a half to two years?

A. Yes.

* * *

[Testimony of Anthony Earl Samuels, Tr. 290, R. 223]

* * *

[Tr. 321, R. 254]

Q. Okay and it was not anybody from U.S. Silica that you needed to get out there?

A. No.

Q. It was somebody from your railroad.

A. Correct.

Q. And as Mr. Rogers approached the hole and you knew that the hole that he was approaching from his side curved to some extent, did it occur to you at any time to say, Mr. Rogers, watch out for that hole?

A. No, it didn't occur to me at all.

Q. At all? What not?

A. It just didn't.

Q. Why?

A. It just didn't.

Q. Did you assume that Mr. Rogers knew what he was doing?

A. Yes.

Q. Did you assume that Mr. Rogers would appreciate as you did the hole?

A. Appreciate what?

Q. Appreciate the condition he was inspecting.

A. I just didn't see that happening at the time.

Q. No, no, no, I said did you assume Mr. Rogers being the inspector and the investigator sent to investigate this hole would recognize the hole as you did?

A. Not from the side he came up on, if that's what you are saying.

Q. Why is that?

[Tr. 322, R. 255]

A. If he was approaching, you know, you can't see this side, you can see the other side as he was approaching.

Q. What the side you are saying he couldn't see is the side you could see?

A. Right, we could see opposite sides.

Q. Okay, so the side he's approaching is the side that you are saying was curved in?

A. Yes, somewhat.

Q. Did you tell him that the side you are approaching is curved in?

A. No, I didn't.

Q. And I guess – why not?

A. I just didn't.

Q. Was Mr. Coleman there?

A. I'm not sure if he was there during the time Mr. Rogers threw himself back.

Q. Let's see –

A. There were a number of people around that work at U.S. Silica also.

Q. But U.S. Silica was not involved in this inspection, were they?

A. No, they were just employees.

Q. You don't even know who they are.

A. No, I don't know none of the guys, like they don't know me.

Q. All right. But so we can get it clear, on which side of the hole were you standing, the side opposite Mr. Rogers?

A. Opposite of Mr. Rogers.

* * *

[Testimony of Ronald H. Dunn, Tr. 373, R. 306]

* * *

[Tr. 386, R. 319]

* * *

Q. I understand that. Let me make sure – my question, obviously, wasn't clear. Whether or not the railroad has a side track agreement, the railroad has to comply with those requirements and standards.

A. The railroad has to have – has to comply with those standards with casing of underground pipe structures.

Q. That's right, but those standards apply to the railroad. They do not apply to U.S. Silica.

A. The railroad obviously has to know if a shipper has clandestinely or otherwise installed a pipe structure under its operating track.

* * *

[Tr. 419, R. 352]

* * *

Q. Did your investigation reveal whether this pipe was being replaced between the time whenever it was installed up until the time that Dave was hurt?

A. It had been repaired on Friday the 26th.

[Tr. 420, R. 353]

Q. Had it also been replaced on occasions according to the testimony?

A. Oh, there's ample testimony that it had been replaced on many, many occasions.

* * *

[Tr. 426, R. 359]

* * *

Q. Now here's my question. If there had been on Saturday a blowout of the slurry line that U.S. Silica had gone in and dug out enough to get a man in there to go down and patch it, then they filled it up, and then either in that same place or somewhere within a few feet of that same place, if there had been another blowout that had been let's say it had been fixed or not been fixed and the water, that is, just water had been run through that slurry line in order to clean it out, could that water and that kind of sub-strata that's out there, could that have created – water could create a hole, correct?

A. Yes, sir.

Q. In fact, couldn't it have created the type of hole that goes it's sort of like a cavern that goes back up under the surface so that the hole beneath the surface is actually bigger than the hole that you see on top of the surface?

A. And you are speaking strictly of water passing through the carrier pipe and not a slurry mix?

Q. Well, yes, sir.

A. Yes, sir, that's correct.

* * *

[Tr. 457, R. 390]

Q. Would Norfolk Southern be in violation of its own guidelines?

MR. MCMASTER: Objection.

THE COURT: Overruled.

A. In my opinion, yes.

Q. The purpose of the guidelines and the standards, Mr. Dunn, are to protect the operation of the railroad of Norfolk Southern over the industry tracks, aren't they?

A. Partially. It's also to protect the shipper's facility that is adjacent to the track so that a washout does not cause a derailment and the result being the train run into the shipper's building.

Q. All right, I know that, but it's for the safety of the operation of the train on that track to all parties?

A. All parties collectively and not one party in isolation.

Q. And the duty to see that its guidelines and its standards that it has adopted are complied with is a duty of Norfolk Southern?

A. If they had not disseminated those standards to the shipper –

Q. Yes, sir.

A. – I agree.

Q. It is Norfolk Southern's duty to see that their guidelines and standards are complied with.

A. I agree.

Q. Which would include the duty to, in fact, disseminate any information that he wants an industry side track to comply with?

A. Correct.

* * *

[Testimony of John David Rogers, Tr. 727, R. 657]

* * *

[Tr. 738, R. 668]

* * *

Q. How long have you been assigned to a territory that includes U.S. Silica?

A. U.S. Silica really had only been on my territory the best I recall about a year and a half.

Q. Okay and did you have a regular schedule for going out there for inspection?

A. Yes, sir, once every 30 days.

Q. Did you have a judgment or estimate or judgment based on your recollection how many times you had been to U.S. Silica as assistant track supervisor before June 28, 1993?

A. Yes, sir, I was probably there from 12 to 15 times.

Q. All right and this was before the 28th, okay?

A. Yes, sir.

Q. When you went out there, what was your job?

A. When I would go to the facility?

Q. Yes, sir.

A. It was to inspect their track to make sure our trains and our crews could operate over it safely.

Q. And what specifically were you inspecting and looking for and looking at?

A. Looking at rail conditions, the conditions, whether or not the gauge was set correct to where the train could operate over the track.

Q. Did you measure that?

[Tr. 739, R. 669]

A. Yes, sir. And looking to make sure the switch points fit up properly, they were not worn out, the frogs were in good shape, just anything that would interfere with the safe operation of the track.

Q. At any time before the 28th of June did your inspections require you to look for or to inspect pipes?

A. No, sir.

Q. Do you know of any department or any individual at the railroad that did have the responsibility of looking for and inspecting pipes at an industry like U.S. Silica? You might just wait a second. (Train coming through, a lot of noise.)

A. Would you repeat the question?

Q. Okay, do you know of any individual or department of the railroad who did have the responsibility of going out to U.S. Silica and inspecting the pipes that might run under the track?

A. The bridge and building department has the ultimate responsibility of checking or inspecting and checking culverts, water lines, that type stuff.

Q. Are you in the bridge and building department?

A. No, sir, that's a separate department.

Q. Were you ever asked to do that at U.S. Silica?

A. No, sir.

Q. And I think I may have asked you and I'm sorry if I did, did you know before June 28, 1993 of any pipe running under the industry's track there at U.S. Silica?

A. No, sir, I did not.

* * *

[Testimony of Philip William Burke, Tr. 931, R. 856]

* * *

[Tr. 952, R. 877]

* * *

Q. All right. Did you, in fact, handle the replacement of the line on Tuesday?

A. Yes, sir.

Q. And you replaced 140 feet?

A. Yes, sir.

Q. Tell us what is involved in replacing the 140 feet of Nypak pipe on the eight and nine line.

A. It would be dug up from starting at the beginning of the pump out to where it comes out of the ground over on the sand area going towards the cyclone.

Q. And I'm going to show you what has been marked as defendant's Exhibit Number 4. Step down here.

A. (Witness complied.)

Q. Does plaintiff's Exhibit Number 4 reflect where the eight and nine line goes into the ground?

A. Yes, sir, this is the hose that comes off here and goes into the ground and goes on out to the cyclone.

Q. All right. How far is that line that goes into the ground from the track – this is the sand track that you are looking at in plaintiff's Exhibit 4?

A. Yes, sir, this is the sand track.

[Tr. 953, R. 878]

Q. How far is the point of where that line goes into the ground to the sand track?

A. I would say probably 20 feet.

Q. Okay. Now I show you plaintiff's Exhibit Number 2 and ask you would you point out where the location was on plaintiff's Exhibit 4, which you just pointed out to the jury, I'll hold plaintiff's Exhibit 4 up.

A. This particular area right here close to the pump is right here in this particular area right here – if you notice, you can see the sand here, it would be right there.

Q. And you are pointing on plaintiff's Exhibit Number 2 to an area just east of the last rail car that you see in this photograph –

A. Yes, sir.

Q. – And on the –

A. Sand –

Q. I guess the building end of the railroad car?

A. Right.

Q. All right. And then can you determine in plaintiff's Exhibit Number 2 where the eight and nine line after it goes in the ground on plaintiff's Exhibit Number 4?

A. This is the line where it comes out of the ground right here and goes by this particular building, which is Columbia Silica's building, which goes out here to the cyclone, which would be way out here (demonstrating).

Q. And that line runs for what distance approximately?

A. Probably a quarter of a mile.

[Tr. 954, R. 879]

Q. All right. And as you approach the end of the eight and nine line out at what we call the cyclone that's been referred to before what would you see if you looked in the direction of the cyclone?

A. You would see the sand pipe where the cyclone –

* * *

[Motion for Directed Verdict Colloquy, Tr. 984, R. 906]

* * *

[Tr. 986, R. 908]

* * *

THE COURT: They have a duty under the FELA to maintain a safe working place for their employees, don't they?

MR. MCMASTER: Yes, sir, they do. They do that, but, again, there must be some evidence of negligence.

THE COURT: Well, isn't there facts in which it could be inferred that they breached their duty to require the co-defendant, U.S. Silica, to encase those pipes? There's testimony in the record, isn't there, from which that fact could be inferred? I'm not saying that that's what they will find, but isn't there evidence in the record?

MR. MCMASTER: I think Mr. Dunn said that or something like that.

* * *

[Jury Charge, Tr. 1074, R. 996]

* * *

[Tr. 1083, R. 1005]

* * *

[THE COURT:] I charge you, Madam Forelady and ladies and gentlemen, under the Federal Employers Liability Act negligence on the part of the defendant railroad or its agents, servants or employees is a legal cause of injury or damage to cause plaintiff's employees when the negligence played any part in producing plaintiff's injuries. In other words, as stated in the Federal Employers Liability Act statute, defendant railroad is liable for plaintiff's injuries resulting in whole or in part from the negligence of any of the officers, agents or employees of the railroad.

I charge you before defendant can be charged – railroad can be charged with the negligence in failing to provide a reasonably safe place to work plaintiff must prove that the defendant railroad knew or in the exercise of ordinary care should have known that an unsafe condition existed and had a reasonable opportunity either to warn the plaintiff of such condition or to remedy the same.

I charge you the defendant railroad – a defendant railroad has the duty to exercise reasonable care to provide plaintiff with a reasonably safe place in which to work.

* * *

[Tr. 1086, R. 1008]

* * *

[THE COURT:] Madam Forelady, ladies and gentlemen, I charge you it is the duty of the railroad to use ordinary care and prudence in furnishing its employees a reasonably safe place in which to work and to use reasonable precaution to maintain and keep such place in a reasonably safe condition commensurate with the amount of danger which the railroad knew or in the exercise of due care should have known existed in the place where its

employees work. I charge you this duty is continuing and is non-delegable.

* * *

[Objections to Jury Charge Colloquy, Tr. 1101, R. 1023]

* * *

[Tr. 1104, R. 1026]

* * *

[MR. JOHN MCMASTER:] We also object to the Court's failure to charge the requested charges, which we submitted to the Court, which we maintain are proper statements of the law with the exception of those pertaining to punitive damages, which have no bearing or place in this case.

THE COURT: Well, you understand I charged a couple of yours verbatim, Mr. McMaster?

MR. JOHN MCMASTER: Yes, sir.

THE COURT: All right, thank you. I note your exceptions.

* * *